80-301
No.

Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Respondents.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

ADRIAN M. FOLEY, JR.,
Counsel for Appellants,
Gateway I,
Newark, New Jersey 07102.
(201) 643-2060

Of Counsel:

THOMAS S. COSMA,
CONNELL, FOLEY & GEISER,
Newark, New Jersey.

August 26, 1980

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Whether a New Jersey administrative regulation which mandates that private nursing homes accept and treat a "reasonable number" of "medically indigent" patients and prohibits transfers of patients when their private funds are exhausted, as a precondition to licensure, is a valid exercise of the police power or a "taking" of private property for a public use within the meaning of the Fifth Amendment?

2. If the New Jersey administrative regulation is a "taking" under the Fifth Amendment, can the State avoid the necessity of providing just compensation by (a) authorizing and encouraging the nursing homes to seek recompense from other private paying patients and (b) forcing the private nursing homes to participate in the voluntary State Medicaid program?

3. Do administrative regulations which impose upon a renewal licensee the obligation to make available a "reasonable number of beds" to a "reasonable number of indigents" and that the licensee "shall be entitled to a reasonable rate for Medicaid patients" suffer from unconstitutional vagueness and ambiguity by providing no effective limitations on the number of indigents and the method and amount of reimbursement so they cannot be understood by persons of common intelligence?

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JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Respondents.

On Appeal from the Supreme Court of New Jersey

Jurisdictional Statement

Appellants appeal from the judgment of the Supreme Court of New Jersey entered on May 28, 1980, and submit this statement to show that substantial federal questions are presented and that the Supreme Court has jurisdiction of the appeal.

Opinions Below

The opinion of the New Jersey Supreme Court is printed in Appendix A hereto, p. 1a, and is reported at 83 N.J. 67, 415 A.2d 1147 (1980). The opinion of the intermediate appellate court (New Jersey Superior Court, Appellate Division) is printed in Appendix B hereto, p. 19a, and is reported at 168 N.J. Super. 152, 402 A.2d 246 (App. Div. 1979).

Jurisdiction

Appellants filed various actions in January, 1978 in the Superior Court of New Jersey, Appellate Division, to declare as facially unconstitutional the administrative regulations, subchapter 14 entitled "Beds for Indigent Persons", N.J.A.C. 8:30-14.1 to 14.7 (Division of Administrative Law, Dept. of State, N.J.) (Supp. 3-20-78), reproduced at Appendix C herein, p. 34a, on the basis that the regulations violate the Taking Clause of the Fifth Amendment to the Constitution of the United States by appropriating appellant's property without just compensation. The various appeals were consolidated while pending in the Superior Court, Appellate Division.

The New Jersey administrative regulations, appellants argued, by requiring private nursing homes to set aside a "reasonable number" of beds, without cost, to "indigent persons" as a condition of state licensure effected a "taking" of appellants' property for which the State must provide just compensation. Nevertheless, the Appellate Division, on May 1, 1979, held the State was acting within its police power in so conditioning licensure and that appellants would be relegated to obtaining compensation from private patients or state Medicaid, a supposedly voluntary program, for carrying the cost of the indigents.

On appeal to the New Jersey Supreme Court, that Court, in a judgment entered on May 28, 1980, held that the administrative regulations did not violate the Fifth Amendment because a six to eight month waiting period for an indigent to find an available bed created an emergency condition justifying this alleged exercise of the police power. It stated, "All nursing homes should be required to share in the burden of caring for indigent patients," (83 N.J. at 80, Appendix A, p. 11a-12a) whether or not the nursing homes received any compensation therefor. The Notice of Appeal was filed in that Court on June 27, 1980. Appendix D, p. 41a.

Jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2). An administrative regulation, like a municipal ordinance, should be accorded the same constitutional limitations as any State statute. See *Erznoznik* v. *City of Jacksonville, Fla.*, 422 U.S. 205 (1975). This principle is especially applicable where the language of the administrative regulation closely tracks the wording of a proposed State statute which was continuously defeated by the New Jersey Legislature.

Statutory and Constitutional Provisions Involved

New Jersey Administrative Code, subchapter 14 ("Beds For Indigent Persons"), N.J.A.C. 8:30-14.1 to 14.7 (Div. of Administrative Law, Dept. of State, N.J.) (Supp. 3-20-78).

Reprinted in Appendix C to this Jurisdictional Statement, p. 34a.

U.S. Const., Amend V

> ". . . nor shall private property be taken for public use, without just compensation."

U.S. Const., Amend XIV, § 1

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

Statement of the Case

The facts in this attack on the constitutionality of certain administrative regulations adopted by the respondent, New Jersey Commissioner of Health, with the approval of the respondent, Health Care Administration Board ("HCAB"), N.J.A.C. 8:30-14.1 to 14.6, are essentially undisputed. Appellants are private health care facilities ("nursing homes") located and operating in the State of New Jersey. As nursing homes, they are subject to annual licensing by the Commissioner of Health. N.J.S.A. 26:2H-12(b) authorizes the Commissioner of Health to examine the rules and by-laws of nursing homes to determine that the rules are "fit and adequate" and that a licensee is in a compliance position. Critically important is the fact that the appellants do not participate in the voluntary State Medicaid program (Discussed more fully *infra,* pp. 11-13).

On January 5, 1978, the Commissioner of Health, with the approval of the HCAB, adopted the regulations, which were published in 9 N.J.R. 516 (a) (1977) and made effective February 9, 1978.

Briefly, the newly promulgated regulations require "all long-term care facilities [which include appellants private nursing homes] *as a condition for renewal of or for issuance on an operating license* to accept and care for indigent persons". N.J.A.C. 8:30-14.1, Appendix C, p. 34a (Emphasis added). An "indigent person" is defined as one

already participating in the State Medicaid program and certified as needing nursing care or a person who could qualify under the State Medicaid program for such nursing care. N.J.A.C. 8:30-14.3, Appendix C, p. 35a.

All renewal licensees may be required to make a reasonable number of beds available to indigent persons. Alternatively, the Commissioner of Health "may require a facility to maintain *all* patients regardless of a change in their economic statuus." N.J.A.C. 8:30-14.4(a), Appendix C, p. 35a (Emphasis added).

The regulations do not contain provision for any compensation whatsoever to the licensees for each indigent bed ordered by the Commissioner of Health for a particular nursing home. Rather, the guidelines look to only one factor in determining the financial impact of the imposition: "Whether the nursing home would be able to make a just and reasonable rate on equity if required to accept and care for indigent persons." N.J.A.C. 8:30-14.4(b)(5), Appendix C, p. 36a.

How the Federal Question was Presented

Appellants filed their appeals, later consolidated, from the promulgation of these regulations in January, 1978 in the Superior Court, Appellate Division. Appellants there contended that requiring private nursing homes to replace, in the most physical sense, paying patients with indigent patients in order to obtain or to remain state-licensed constituted a clear "taking" of private property for a public use, prohibited by the Fifth Amendment in the absence of just compensation. Undeniably, the regulations failed to prescribe any means for compensating this taking. Appellants also stated that the regulations were so vague and ambiguous in casting licensee's obligations that even if

there was no taking, the regulations couldn't be understood by persons of common intelligence.

The Superior Court, Appellate Division, ruled that the challenged regulations were issued within the authority of the State Department of Health and HCAB. It further held that compulsory participation in the State Medicaid program did not constitute a taking of private property for public use without just compensation because: (1) facilties are entitled to a "reasonable" rate for Medicaid patients; (2) administrative regulations and statutes grant facilities the right to administrative and judicial review of their rates for Medicaid patients; (3) as areas affected by the public interest, the health and welfare of elderly and infirm indigents are subject to governmental control and rate regulation under the State's police powers; and (4) any losses incurred due to treatment of Medicaid patients may be recouped by charges to private pay patients. Finally, the Superior Court, Appellate Division opined that the contested regulations were not impermissibly vague.

The Supreme Court of New Jersey thereafter granted appellants' Petition for Certification to the Superior Court, Appellate Division. 81 N.J. 330, 407 A. 2d 1204 (1979). On May 28, 1980, the New Jersey Supreme Court ruled the regulations were constitutional under the Fifth and Fourteenth Amendments. The court felt the only avenue of redress for incurring this economic burden was through the "just and reasonable rate on equity" provision and the "recognition" that "Medicaid reimbursement for indigent care is available." 83 N.J. at 81. Appendix A, pp. 12a and 13a.

I

The Federal Questions are Substantial.

A. A State may not, as a condition of licensure, order private health care facilities to house and support indigent patients without payment of just compensation.

Appellants submit that under any theory of compensation law enunciated by this Court since *Mugler* v. *Kansas*, 123 U.S. 23 (1887), the administrative regulations at issue in this case clearly reflect a taking of private property for a public use. No matter whether the analysis follows the physical invasion theory,[1] the noxious use doctrine,[2] the diminution of value theory[3] or, as one scholar termed it, the government enterprise theory,[4] the regulations have crossed the line from a legitimate exercise of regulatory authority to an appropriation of private property for a public use.

The Court is not dealing with a regulation which restricts appellants' use of their property for certain forbidden purposes which are prejudicial to the public welfare. To the contrary, the State presents a picture of an affirmative need for long term health care facilities for indigent persons. Rather than build facilities to satisfy this public need, the State has decided to allocate indigent

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[1] *United States* v. *Causby*, 328 U.S. 256 (1946).

[2] *Atchinson, T. & S.F. Ry.* v. *Public Utilities Commr's*, 346 U.S. 346 (1953).

[3] *United States* v. *General Motors*, 323 U.S. 373 (1945).

[4] See Sax "Takings and the Police Power," 74 *Yale L.J.* 36 (1964).

persons to all private homes. The State has, in effect, replaced a private paying patient with an indigent person without means to pay from personal resources. Thus, insofar as the State confiscates a bed (with the medical, food and other services incidental thereto) from a private nursing home, the State has asserted a proprietary interest for itself in the affected property. The State obtains direct economic benefits because, were it not for the private nursing homes, the State would be compelled to construct such health care facilities. To the extent the State allocates a bed to an indigent person, it restricts property from remaining in the owner's hands.

The appellants present use of their facilities can in no way be termed "noxious" so that it offends any member of the public or poses a danger as a result of appellants' activities. The State has interfered with "unoffending" property such that compensation is required.

The State argues that inherent safeguards, such as assurance of a "reasonable rate of return," ameliorate any economic harshness caused by the regulations. Whether an economic entity retains profitability is simply irrelevant to a taking in this case. The State has appropriated appellants' property for its own account to finance (or more accurately, to avoid the necessity of financing) its own enterprise. Thus, the State is a direct economic beneficiary of its own act. *Fletcher* v. *Peck,* 10 U.S. (6 Cranch.) 87 (1810).

> Property has been taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired.[5]

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[5] *United States* v. *Dickinson,* 331 U.S. 745, 748 (1947).

The New Jersey courts attempted to rationalize the confiscatory regulations by claiming that since "there is a demonstrated shortage of nursing home beds for indigents" then "[A]ll nursing homes should be required to share in the burden of caring for indigent patients." 83 N.J. at 80. Appendix A, pp. 11a and 12a. That this argument fails to pass constitutional muster is exemplied by Mr. Justice Holmes statement that:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[6]

In truth, the New Jersey courts implicitly admitted that the regulations represented a direct acquisitional act by a government entity or an excessive regulation under the police power. Both the Appellate Division and the Supreme Court discussed at length possible avenues of reimbursement for indigents' costs. Two possible sources of compensation were given: "many nursing homes will increase their rates to private patients to offset the net cost of maintaining indigent patients" (83 N.J. at 84, Appendix A, p. 16a) and "the regulations have the effect of strongly encouraging participation in the Medicaid program." (83 N.J. at 85, Appendix A, p. 17a).

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[6] *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415-416 (1922). The New Jersey Supreme Court admitted that these regulations "are directed at an acute social problem." 83 N.J. at 81. Appendix A, p. 13a.

If the New Jersey courts had rested their justification in finding a source of compensation solely on the shoulders of private citizens this case would be appropriate for summary reversal. The State, not private citizens, must pay just compensation. It is inconceivable that any court could conscience such a blatant violation of the rights of non-consenting private citizens.[7]

It is, however, from the second source of funding, the State Medicaid program, that a new and significant constitutional question is presented.

B. A State may not compel a private health care facility to participate in the State Medicaid program as a condition of State licensure and in order to receive some compensation for a "taking".

The appellants have demonstrated that the administrative regulations proceed to physically appropriate appellants' property without receiving any reciprocal economic benefit so that a taking has occurred. The New Jersey Courts have so much as conceded this by telling appellants that government funding is available. The question now presented is whether the existence of a source of federal funds, specifically a voluntary federal health care program, circumvents the constitutionally mandated payment of just compensation by the State.

The significance of this federal question cannot be overestimated. For if the question is answered in the affirmative, the effects will be far-reaching and will produce a devastating attack on the Fifth Amendment and

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[7] See, e.g., *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); *United States ex rel. Tennessee Valley Authority* v. *Indian Creek Marble Co.*, 40 F. Supp. 811 (D.C. Tenn. 1941).

the constitutional rights of the appellants. There is no difference between the State allocating nursing home beds to medically indigent persons and a State demanding private or parochial schools to set aside a certain number of seats to indigent students in order to obtain a State license. Does anyone doubt there is a crisis in New Jersey public education? Is this not a "taking" even if parents of private students may pay the difference and even if a school may be eligible for federal aid under a voluntary program in which it chooses not to partake?

The States cannot shirk responsibility for payment of socially desirable public conditions by trampling on the constitutional rights of licensees. The grantee of a privilege license cannot be required to surrender its constitutional protections in order to obtain a state-controlled license.[8]

A concise review of the Medicaid[9] and Medicare[10] programs will disclose their voluntary nature and the consequent violation of federal law by coercing appellants to join the Meidcaid program in order to receive some compensation and to assure a State license.

The Medicare Act establishes a federally funded and administered health insurance program furnishing medical care and services for the aged. The Medicaid Act, on the other hand, establishes a cooperative federal-state program to enable States to furnish medical assistance on behalf of aged, blind, or disabled individuals whose

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[8] *C'est Bou, Inc.* v. *North Carolina State Bd. of Alcoholic Control,* 325 F. Supp. 404 (D.N.C. 1971).

[9] Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*

[10] Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*

income and resources are insufficient to meet the cost of necessary medical services. Such individuals are known as "medically indigent" patients. Under Medicaid, the federal and state governments share the costs of such services. States are not required to participate in the Medicaid program, but, if they do, they must comply with federal statutory and regulatory requirements, many of which incorporate requirements of the Medicare program, in order to qualify for federal funding.

Medicaid beneficiaries may obtain services "from any institution . . . qualified to perform the service or services required . . . who undertakes to provide him such services."[11] Further, a State Medicaid plan must provide for certain agreements with providers in which records are kept by the providers and furnished to various authorities.[12] The federal regulations which mandate a contractual relationship between providers and the State Medicaid agency[13] and specify the terms of that contractual relationship reinforce the volunary underpinnings of the Medicaid Act.[14] The providers, once enlisted,[15] must accept Medicaid rates as payment in full for services to beneficiaries.[16]

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[11] 42 *U.S.C.* § 1396(a) (23).

[12] 42 *U.S.C.* § 1396a (a) (27).

[13] In New Jersey, the Medicaid plan is administered by the Department of Human Services.

[14] 42 *C.F.R.* § 442(b).

[15] 42 *C.F.R.* § 447.204.

[16] 42 *C.F.R.* § 447.15.

While forced participation in a State Medicaid program to insure some compensation for a taking is a question of first impression, other authorities have considered disputes between providers and State Medicaid programs. Providers have been admonished that if they did not wish to be governed by Medicaid regulatory scheme, they were free to forego participation.[17] The point is, quite simply, that a provider must remain free to make the choice between participation and exclusion. If the choice consists of receiving some compensation for providing health care to indigents and receiving no recompense, this Court can

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[17] In *Briarcliff Haven, Inc.* v. *Department of Human Resources of the State of Georgia,* 403 F. Supp. 1355 (N.D. Ga. 1975), a Medicaid SNF challenged Georgia's reimbursement ceilings. In rejecting this challenge, the Court noted:

> Providers of services are not required to participate in a State's Medicaid program, but if they do choose to participate, they must agree to accept payment in accordance with the state plan provision. According to 45 C.F.R. § 250.30(a)(6) [now 42 C.F.R. § 447.15], the state plan must provide for limiting participation in the program to providers of services who accept, as payment in full, the amount paid in accordance with the state's established fee structure. If a qualified provider believes that it is able to collect higher fees by not participating in the Medicaid program, it need not choose to participate. The Medicaid program is not designed to protect providers from the consequence of their business decisions or from business risks. 403 F. Supp. at 1362-63 (bracketed material added).

This point was re-emphasized in the Court's concluding remarks (403 F. Supp. at 1364):

> . . . Briarcliff is not required to participate in the Georgia Medicaid program, such a decision is completely voluntary on the part of the provider. If Briarcliff does elect to participate in the program it may terminate participation at any time and for any reason.

readily see the constitutional flaw in New Jersey's regulations. What the Congress has established as a voluntary medical assistance plan, with partial federal funding, has been transmuted into a compulsory State health insurance plan to which nursing homes are subject by dint of a license privilege.

(Should this Court not agree that the judgment appealed from meets the requirements of 28 U.S.C. § 1257(2), we respectfully request that the Court treat this Jurisdictional Statement as a petition for certiorari under 28 U.S.C. § 1257(3)).

CONCLUSION

For these reasons, this Court should note proable jurisdiction of this appeal.

Respectfully submitted,

ADRIAN M. FOLEY, JR.,
Counsel for Appellants.

Dated: August 26, 1980

APPENDIX A

Opinion of the Supreme Court of New Jersey

(Filed—May 28, 1980)

SUPREME COURT OF NEW JERSEY

A-83/84—Septemeber Term 1979

In the Matter of the Review of Administrative Promulgation of the HEALTH CARE ADMINISTRATION BOARD: N.J.A.C. 8:30-14.1 through 8:30-14.6.

NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES, a corporation not for profit of the State of New Jersey, and WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF-LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, and the HEALTH CARE ADMINISTRATION BOARD,

Respondents,

and

PUBLIC ADVOCATE OF NEW JERSEY,

Intervenor-Respondent.

Appendix A

Argued March 4, 1980—Decided May 28, 1980.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 168 N.J. Super. 152 (1979).

Adrian M. Foley, Jr. argued the cause for appellant nursing homes (*Connell, Foley & Geiser,* attorneys; *R. Peter Connell* on the brief).

Jonathan D. Weiner argued the cause for appellant New Jersey Association of Health Care.

Thomas C. Fox, a member of the bar of the District of Columbia, argued the cause for *amicus curiae* American Health Care Association (*Jonathan D. Weiner,* attorney; *Joel M. Hamme* and *E. Michael Flanagan,* members of the bar of the District of Columbia, on the brief).

Andrea M. Silkowitz, Deputy Attorney General, argued the cause for respondents Finley and Health Care Administration Board (*John J. Degnan,* Attorney General of New Jersey, attorney; *Stephen Skillman,* Assistant Attorney General of counsel; *Frederick S. Title,* Deputy Attorney General, on the brief).

Arthur Penn, Assistant Commissioner, argued the cause for respondent Public Advocate (*Stanley C. Van Ness,* Public Advocate of New Jersey, attorney *pro se*).

Toby S. Edelman, a member of the bar of the District of Columbia, submitted a brief on behalf of *amicus curiae* Gray Panthers.

Mary K. Brennan submitted a brief on behalf of *amicus curiae* New Jersey Hospital Association.

The opinion of the Court was delivered by SULLIVAN, J.

Appendix A

We granted certification, 81 N. J. 330 (1979), to consider challenges to the legality of administrative regulations, N.J.A.C. 8:30-14.1 *et seq.*, which were adopted by the Commissioner of Health with the approval of the Health Care Administration Board. In essence, the regulations require nursing homes to make available "a reasonable number of [their] beds to indigent persons" as a condition of licensure. N.J.A.C. 8:30-14.4(a). The Appellate Division upheld the regulations. 168 N. J. Super. 152 (1979). We affirm.

The events leading up to the adoption of the administrative regulations were summarized by the Appellate Division as follows:

> The record before us amply demonstrates that N.J.A.C. 8:30-14.1 *et seq.* was adopted in an effort to alleviate the acute shortage of long-term care nursing home beds available for indigent persons in this State. Apparently, state-licensed nursing homes were largely unwilling to voluntarily accept and treat indigent patients. Although the State Medicaid program reimbursed qualified nursing homes which voluntarily accepted indigents for their care at standard rates, the homes could generally obtain greater fees from private paying patients than from Medicaid reimbursement. This fact led to the unwillingness of many private nursing homes to accept indigent persons. Consequently there developed a severe shortage of accommodations for indigents. Whereas it normally took one to three days for a private pay patient to find an available nursing home bed, it often required six to eight months for a Medicaid eligible patient. As a consequence of this acute shortage many Medicaid

> eligible patients needing nursing home care had to remain in their homes or in general care hospitals or other institutions unsuited to their requirements for undue periods or indefinitely. Another critical situation was presented by the plight of paying patients who were forced to vacate when their financial resources were depleted (so-called "transfer-trauma").
>
> [168 N. J. Super. at 158]

Recognizing the serious problem, the Department of Health at the request of the Director of the State Medicaid Program, asked the Attorney General whether the Department of Health could include a requirement in its health facility licensing standards that proprietary facilities accept and treat a certain number of indigent patients. By letter opinion dated January 31, 1975, the Attorney General advised that the Department lacked the power to include such a requirement in its licensing standards. However, at the urging of the Commissioner of Health,[1] the Attorney General reconsidered the question and in Formal Opinion No. 15-1977 ruled that a nursing home could be required to provide for the care and treatment of a specified number of indigent persons as a condition of licensure. The opinion noted that there was

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[1] The Public Advocate had filed a petition with the Department of Health, pursuant to N.J.S.A. 52:27E-32(a), seeking the adoption of an administrative rule requiring nursing homes to accept a certain number of indigent patients. The Commissioner, relying on the Attorney General's opinion, denied the petition on the ground that she lacked the legal authority to adopt such a rule. The Public Advocate then appealed this ruling to the Appellate Division.

an acute shortage of nursing home beds available for indigent persons. It referred to the statutory provisions for health care facilities, N.J.S.A. 26:2H-1 *et seq.*, and particularly section 12(b) which authorizes the Department of Health to condition licensure of a health care facility upon findings that the "premises * * * and standards of health care services are fit and adequate." The opinion also emphasized that since nursing homes are given a special status under section 7 by being allowed to operate largely on a noncompetitive basis, it was therefore implicit under this statutory provision that a nursing home must fully serve the public interest in its approved area or region.[2] See N.J.S.A. 26:2H-7.

Proposed regulations were immediately drafted by the Commissioner. At the October 6, 1977 meeting of the Health Care Administration Board[3] (Board), representatives of the nursing home industry who had received copies of the proposed regulations were given the opportunity to present objections. The proposed regulations were then published in 9 N.J.R. 516(a) (1977), and resulted in the receipt of numerous comments which were considered by the Department. Some modifications of the proposed regulations were made and submitted to interested persons including appellant Association prior to the Board meeting of January 5, 1978. At that meeting, after further discussion in which interested persons were

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[2] As a result of Formal Opinion No. 15-1977 the Public Advocate dismissed his appeal pending in the Appellate Division.

[3] The Board is part of the Department of Health. N.J.S.A. 26:2H-5(b) provides that "[t]he commissioner, with the approval of the board, shall adopt and amend rules and regulations * * *."

allowed to participate, the Commissioner, with the approval of the Board, adopted the regulations. N.J.A.C. 8:30-14.1 *et seq.* (effective January 24, 1978).

Basically, the regulations require a long-term care facility (licensed nursing home) as a condition of licensure, to make available "a reasonable number of its beds to indigent persons." As an alternative, the Department may require a facility to maintain all patients regardless of a change in their economic status. N.J.A.C. 8:30-14.4(a). Under the regulations, the Department is to notify the facility of the requirement to make available a percentage of its beds to indigent persons 90 days prior to the renewal of a license or upon application for a license for a new facility. *Ibid.* An indigent person is defined as "a person participating in the State Medicaid program and certified as needing nursing care, or a person who could meet the eligibility requirements for receiving nursing care under the State Medicaid program." N.J.A.C. 8:30-14.3.

In determining whether to require a long-term care facility to provide a reasonable number of its beds for indigent care, or to require a facility to maintain all patients regardless of their economic status, the Departmetn is required to consider but is not limited to the following:

> 1. Whether there currently exists a long-term care bed shortage for indigent persons, and if so, the extent and location of the shortage;
>
> 2. The State health plan or the plans of the appropriate health systems agencies;
>
> 3. The length of time indigent persons must await for placement of long-term care facility;

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4. The costs of providing care to indigent persons in need of nursing care to other health care providers;

5. Whether the nursing home would be able to make a just and reasonable rate on equity if required to accept and care for indigent persons;

6. Whether a certificate of need granted for a new, expanded or modernized long-term facility included a commitment to provide a specified number of beds for indigent persons.

[N.J.A.C. 8:30-14.4(b)]

Opportunity to be heard on the administrative determination is provided as follows:

i. Any nursing home which feels it cannot make a just and reasonable rate on equity if required to accept indigent persons may request an administrative review of that decision at least 60 days prior to the date for renewal of its license, at which time the facility shall submit to the department a detailed cost analysis substantiating its claim.

ii. If, after an administrative review of the decision, the department finds against the long-term care facility, it shall notify the facility within 30 days of the date for renewal of its license.

iii. Consistent with the Adminstrative Procedure Act and chapter 136 (Health Care Facilities Planning Act of 1971), the long-term care facility may ask for an administrative hearing within 30 days of the revocation notice from the department.

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> iv. Applicants for licensure of a new facility shall have the same opportunity for an administrative review for a hearing on the non-issuance of a license.
>
> [N.J.A.C. 8:30-14.4(b)(6)]

Following the January 5, 1978 adoption of the regulations, appeals were filed by the New Jersey Association of Health Care Facilities and by a number of nursing homes. The appeals were consolidated and, after hearing argument, the Appellate Division filed its opinion upholding the regulations. 168 N. J. Super. 152 (1979). Appellants attack the facial validity of the regulations. This appeal does not involve a challenge by any nursing home to a particular allotment of beds for indigents—that is—to the regulations as applied. Appellants argue that the regulations (1) are not within the power delegated to the Board by the State Legislature, (2) effect a taking for public use without just compensation, (3) are unconstitutionally vague, (4) violate equal protection and (5) conflict with the Federal Medicaid statute.

I.

Although the Department, subject to Board approval, is specifically authorized to "adopt and amend rules and regulations * * * to effectuate the provisions and purposes of this act," N.J.S.A. 26:2H-5(b), appellants argue that the regulations in question exceed the power given to the Department by the Legislature in N.J.S.A. 26:2H-1 *et seq.* and are therefore void. Specifically, appellants contend that the Department is attempting to regulate the *quantity* of health services through licensure. Ap-

pellants argue that this amounts to a misuse of that function in that licensure is designed to control only the *quality* of such services.

The Appellate Division found this argument to lack merit. We agree. It is undisputed that there is an acute shortage of nursing home beds available for indigent persons in this State. This suffices to justify the Department's action. Indeed, the regulations adopted express the Commissioner's finding that the health of indigents "is now or will be in danger because of the acute long-term care bed shortage for the indigent in the State * * *." N.J.A.C. 8:30-14.1. The public policy of this State as expressed in the pertinent statute is that health care services "of the highest quality, of demonstrated need, efficiently provided and *properly utilized at a reasonable cost* are of vital concern to the public health." N.J.S.A. 26:2H-1 (emphasis added), see *Borland* v. *Bayonne Hospital,* 72 N. J. 152, *cert.* den. 434 U. S. 817, 54 L. Ed. 2d 73 (1977). To that end, the Department of Health has been designated as the sole agency in the State for comprehensive health planning under the National Health Planning and Resources Development Act of 1974 as amended and supplemented, 42 U.S.C.A. §300 k *et seq.* Accordingly, the Department is vested with "the central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services and *health care facility cost containment programs* * * *." N.J.S.A. 26:2H-1 (emphasis added). Additionally, "all public and private institutions * * * serving principally as boarding, nursing * * * or other homes for the sheltered care of adult persons * * * [are] subject to the provisions of this act." *Ibid.*

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Even though privately owned, nursing homes, like other health care facilities, are quasi-public entities and are subject to extensive regulation in the public interest. See *Doe* v. *Bridgeton Hospital Ass'n, Inc.*, 71 N. J. 478 (1976). A new nursing home must demonstrate the need for nursing services in the area to be served to avoid any unnecessary duplication of health care services. N.J.S.A. 26:2H-8 provides that no certificate of need shall be issued unless the action proposed in the application, among other things, "will contribute to the orderly development of adequate and effective health care services." Under N.J.S.A. 26:2H-12(b)(2) a license for a health care facility "shall be issued by the department upon its findings that the premises * * * and standards of health care services are fit and adequate and there is reasonable assurance the health care facility will be operated in the manner required by this act and rules and regulations thereunder." The foregoing statutory provisions make it clear that the Department has the power to require a health care facility, within reasonable limits, to provide needed health care services in the area served by it and to condition licensure on the providing of "fit and adequate" service. Although the statute does not contain an express grant of power to the Commissioner to allocate beds to indigents, we find that power is implied. Delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public. *New Jersey Guild of Hearing Aid Dispensers* v. *Long*, 75 N. J. 544, 562-563 (1978); *In Re Suspension of Heller*, 73 N. J. 292, 303 (1977).

We conclude that the regulations in question are not arbitrary, capricious or unreasonable and are a proper

exercise of the police power. That power may be exercised to alleviate emergency conditions. *Hutton Pk. Gardens* v. *West Orange Town Council,* 68 N. J. 543, 566 (1975); *Jamouneau* v. *Harner,* 16 N. J. 500, 514 (1954). Emergency conditions create a public need which justifies the exercise of the police power. *Hutton Pk. Gardens, supra,* at 566-567; *Jamouneau, supra,* at 514. There is a demonstrated shortage of nursing home beds for indigents. A waiting period of six to eight months to find an available bed for a Medicaid eligible patient, referred to by the Appellate Division, cannot be tolerated. See 168 N. J. Super. at 158. Appellants' proposed solution of additional nursing homes will not necessarily solve the problems as these homes, unless required to do so, will also probably accept higher paying private patients rather than Medicaid patients.[4] The record indicates that the resources of many private nursing home patients become exhausted and, if they are forced to seek other accommodations, become subject to a recognized condition known as "transfer-trauma." See 168 N. J. Super. at 158. The regulations are also designed to cope with this serious problem. Appellants' suggestion that the Department's power to require the furnishing of nursing care to the indigent should be limited to new nursing homes would be manifestly unfair to the new facilities, as well as to the indigents who would have to await the construction of new facilities. All nursing homes should be

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[4] At the present time, the rates which a nursing home may charge its private patients are unregulated. However, reimbursement rates for nursing care under the State Medicaid program are set by the Department of Human Services under federal guidelines. N.J.S.A. 30:4D-1 *et seq.*; see 42 U.S.C.A. §1396a(a)(13)(E); 42 C.F.R. §447.204.

required to share in the burden of caring for indigent patients. Property rights have always been held to be subject to the common good and the public welfare. The police power "generally * * * may be exerted whenever necessary for the preservation of the public health, morals, comfort, order and safety." *State Board of Milk Control* v. *Newark Milk Co.,* 118 N. J. Eq. 504, 519 (E. & A. 1935). The Commissioner's power to act in this critical area must be recognized.

II.

The contention that the regulations are a taking of private property for public use without just compensation in violation of U. S. Const., Amend. V, U. S. Const., Amend. XIV, §1 and N. J. Const., (1947), Art. I, §20, is similarly without merit. Administrative regulations enjoy a presumption of legality and unless clearly *ultra vires* on their face, and we have held they are not, the person attacking them has the burden of proving their invalidity. *New Jersey Guild of Hearing Aid Dispensers* v. *Long, supra,* 75 N. J. at 561. Restrictions on the use of property, if in furtherance of a valid governmental purpose, serve the public interest and are considered a proper exercise of the police power even though they may result in some economic disadvantage. Local rent control is a prime example of such police power regulation. *Hutton Pk. Gardens* v. *West Orange Town Council, supra.*

In requiring a nursing home to make available a reasonable number of its beds to indigent persons, the regulations do give recognition to the economics involved in that Medicaid reimbursement for indigent care is avail-

able. Also, the Department is required to consider whether the nursing home will be able to make "a just and reasonable rate on equity" if required to accept and care for indigent persons. N.J.A.C. 8:30-14.4(b)(5).[5] Furthermore, a nursing home is given the right to administrative review of any allotment of beds to indigents if it feels it cannot make a just and reasonable rate on equity, N.J.A.C. 8:30-14.4(b)(6), and judicial review of the administrative ruling is afforded under R. 2.2-3(a)(2). Whether the regulation, as applied, will result in arbitrary and unreasonable allotments and deny a just and reasonable rate on equity will depend on the factual circumstances of each particular case. *Bayshore Sew. Co.* v. *Dep't of Env., N. J.*, 122 N. J. Super. 184, 204-205 (Ch. Div. 1973), aff'd o. b. 131 N. J. Super. 37 (App. Div. 1974). In summary, the regulations in question are directed at an acute social problem affecting the health and elfare of the needy, aged and infirm, are well within the power and authority vested in the Department by the Legislature and do not constitute a taking of private property without just compensation.

III.

A further challenge to the regulations involves the terms "reasonable number" of beds for indigents and "just and reasonable rate on equity." Appellants argue that the language is unconstitutionally vague in that no adequate definition thereof has been provided. It is

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[5] In this connection, the availability of Medicaid reimbursement should be considered in determining whether a nursing home is able to make "a just and reasonable rate on equity."

fundamental that administrative regulations must not only be within the scope of the delegated authority, but also must be sufficiently definite to inform those subject to them as to what is required. At the same time, regulations must be flexible enough to accommodate the day-to-day changes in the area regulated. See *Trap Rock Industries, Inc.* v. *Kohl,* 59 N. J. 471, 483 (1971).

We conclude that the challenged terminology is definite enough to satisfy the requirements of due process. N.J.A.C. 8:30-14.4(b), quoted *supra,* specifies precise and adequate criteria which the Department must consider in determining whether to require a nursing home to provide a reasonable number of its beds for indigent care or to require it to maintain all persons regardless of their economic status. Although the regulation literally applies to whether a nursing home should be *required* to provide any beds for indigents, obviously the same criteria would apply to a determination of the number of such beds a nursing home would be required to provide.

We find the term "just and reasonable rate on equity" to be sufficiently definite. In *Troy Hills Village* v. *Parsippany-Troy Hills Tp. Council,* 68 N. J. 604, 628-630 (1975), we applied the term "just and reasonable" with respect to the rate of return in a rent control situation. Similar phrases have been interpreted by courts and sustained. See *Ward* v. *Scott,* 11 N. J. 117, 124-125 (1952). The term "just and reasonable" is common parlance in the field of public utility ratemaking. See N.J.S.A. 48:2-21; *Public Service Coordinated Transport* v. *State,* 5 N. J. 196, 216-217 (1950). We conclude that the standards used in the regulations are definite enough to be understood

and followed and yet flexible enough to give the Department the necessary discretion to proceed on an individual basis weighing the particular circumstances of each nursing home. *Trap Rock Industries, Inc., supra.*

IV.

The equal protection argument is advanced that proprietary homes are being singled out to render care for indigents either for no reimbursements whatsoever, or for a reimbursement from Medicaid at less than the actual cost of such care. The additional argument is made that these nursing homes will be required to charge their private patients higher rates to compensate for the loss sustained on the indigent patients with the result that private patients will be indirectly subsidizing the cost of maintaining indigent patients.

The classification at issue embraces both private and public health care facilities. These facilities, as noted, *supra,* are involved in a quasi-public activity and are therefore subject to extensive regulation in the public interest. Admittedly, the classification is neither a suspect one nor does it implicate fundamental rights. Strict scrutiny therefore does not come into play and appellants would have the burden of proving that a rational basis for such classification does not exist. *Taxpayers Assn. of Weymouth Tp.* v. *Weymouth Tp.,* 80 N. J. 6, 39-40 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Township,* 430 U. S. 977, 52 L. Ed. 2d 373 (1977).

The State has an obligation to see to the availability of health care services needed by its indigents. All

hospitals, whether public or private, are expected to provide care for the needy sick. N.J.A.C. 8:43B-1.11. Nursing homes are an integral part of health care services and, likewise, can be required, within reasonable limitations, to meet the need for indigent beds in their areas. We have already found the requirements in question to be facially reasonable and non-confiscatory. The rates which a nursing home charges its private patients are unregulated. Undoubtedly, many nursing homes will increase their rates to private patients to offset the net cost of maintaining indigent patients. We agree with the Appellate Division that there is nothing invidious in the notion as such. 168 N. J. Super. at 167. In its *amicus* brief, American Health Care Association concedes that there is no federal impediment to subsidization by private patients as long as it is not excessive. See *Property Owners Assn. of N. Bergen* v. *Tp. of N. Bergen,* 74 N. J. 327 (1977); *Borland* v. *Bayonne Hospital, supra.* Any judgment on this score will have to await a case involving specific facts and circumstances.

V.

It is also argued that N.J.A.C. 8:30-14.1 *et seq.* conflict with the Federal Medicaid statute, 42 U.S.C.A. §1396 *et seq.,* and are void and unenforceable for that reason. As advanced, the argument is in two basic parts. *First,* it is submitted that the regulations compel a nursing home to participate in the State Medicaid program which under the federal statute must be on a voluntary basis. *Second,* assuming a state may compel participation in its Medicaid program, it is argued that the reimburse-

ment rates set under New Jersey Medicaid fails to meet the "reasonable cost related basis" standard established under federal law, and therefore constitute a taking of property without just compensation. See 42 U.S.C.A. §1396a(a)(13)(E). In short, it is claimed that the reimbursement rates set in the New Jersey Medicaid program are in violation of the Federal Medicaid statute. We decline to consider this collateral attack on State Medicaid rates. There is no factual record presented; moreover, the Department of Human Services which administers the Medicaid program in this State is not a party to this proceeding. While New Jersey Medicaid reimbursement rates are not immune to a proper challenge involving the proper parties and an adequate factual record, that situation is not present in the appeals before us.

We need not decide whether federal law prohibits a state from compelling a health care facility, as a condition of licensure, to participate in the state's Medicaid program. The regulations in question do not so mandate. Although required to provide for a reasonable number of indigent patients, a nursing home is not obliged to seek Medicaid reimbursement. It can absorb the cost of maintaining an indigent patient as part of its operating expenses and, of course, is free to seek payment from any other available financial resources the patient may have. Without doubt, the regulations have the effect of strongly encouraging participation in the Medicaid program, but this is not prohibited under the federal statute. Indeed, such participation would seem to be in furtherance of the law's broad social objectives. While state participation in Medicaid is on a voluntary basis, those states which enter into the program are afforded

considerable latitude in establishing a comprehensive medical assistance program. That this encompasses requiring provider participation in the caring for the indigent cannot be doubted.

Significantly, the Department of Health, Education, and Welfare, Region II, through its Principal Regional Official, in a letter dated September 18, 1979, has stated "that the New Jersey regulation on its face violates no provision of the [Federal] Medicaid statute" and that enforcement of the regulation would not jeopardize New Jersey's eligibility for federal funds as long as the nursing homes are certified as satisfying federal requirements for long-term care facilities.

Appellants argue that if they elect to participate in the State Medicaid program they subject themselves to that program's regulations and restrictions. In particular, reference is made to Circular Letter 88, now incorporated in N.J.A.C. 10:63-1.16(i)(5)(iii)(2)(C), which imposes restrictions on the involuntary transfer of a Medicaid patient, specifically a patient who enters a facility as a private patient and then becomes a Medicaid patient.

The argument lacks merit. As heretofore noted, a licensed health care facility is subject to comprehensive regulation by the Department and, apart from Medicaid, can be restricted in the involuntary transfer of indigent patients or those who become indigent. One of the very regulations here involved, N.J.A.C. 8:30-14.4(a), empowers the Department, as an alternative to requiring a nursing home to make available a reasonable number of beds to indigent persons, to require the nursing home to maintain all patients regardless of their change in economic stature.

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We have considered all of the remaining points argued and, without discussing them in detail, are satisfied that they are lacking in merit.

The judgment of the Appellate Division upholding the facial validity of the regulations is affirmed.

Justices Pashman, Clifford, Schreiber, Handler and Pollock join in this opinion.

Chief Justice Wilentz did not participate.

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—May 1, 1979)

IN REVIEW OF ADMINISTRATION PROMULGATION OF THE HEALTH CARE ADMINISRATION BOARD N.J.A.C. 8:30-14.1 THROUGH N.J.A.C. 8:30-14.6, NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES, A CORPORATION NOT FOR PROFIT OF THE STATE OF NEW JERSEY, AND WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME AND WOODCLIFF LAKE MANOR NURSING HOME, APPELLANTS V. JOANNE E. FINLEY, M.D., STATE COMMISSIONER OF HEALTH, AND THE HEALTH CARE ADMINISTRATION BOARD, RESPONDENTS, AND PUBLIC ADVOCATE OF NEW JERSEY, RESPONDENT-INTERVENOR.

Superior Court of New Jersey
Appellate Division

Argued February 26, 1979—Decided May 1, 1979.

Before Judges CONFORD, PRESSLER and KING.

Mr. Jonathan D. Weiner argued the cause for appellant New Jersey Association of Health Care Facilities.

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Mr. Adrian M. Foley, Jr. argued the cause for appellants Wayne Haven Nursing Home, Valley Nursing Home, Pine Rest Nursing Home, Dunroven Nursing Home, Allendale Nursing Home, Wellington Hall Nursing Home and Woodcliff Lake Manor Nursing Home (*Messrs. McElroy, Connell, Foley & Geiser,* attorneys; *Mr. R. Peter Connell* on the brief).

Mr. Frederick S. Title, Deputy Attorney General, argued the cause for respondents (*Mr. John J. Degnan,* Attorney General of New Jersey, attorney; *Mr. Stephen Skillman,* Assistant Attorney General, of counsel).

Mr. Arthur Penn, Assistant Commissioner, Department of the Public Advocate, argued the cause for respondent-intervenor *Mr. Stanley C. Van Ness,* Public Advocate, attorney).

Ms. Toby S. Edelman filed a brief on behalf of *amicus curiae* Gray Panthers.

The opinion of the court was delivered by

Conford, P. J. A. D. (retired, temporarily assigned).

These are consolidated appeals challenging the validity of an administrative regulation, N. J. A. C. 8:30-14.1 to 14.6, which was promulgated by the Commissioner of Health and the Health Care Administration Board ("Board") Appellants are the New Jersey Association of Health Care Facilities ("New Jersey Association") and several private nursing homes ("Private Homes").

On November 10, 1977 the Commissioner of Health published in the *New Jersey Register* proposed regulations which would require nursing homes to make available a "reasonable number" of their beds to indigent persons as a condition of licensure or relicensure. See 9 N. J. R.

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516. Pursuant to the notice numerous comments were received from interested persons concerning the proposed regulation. On January 5, 1978 the Commissioner, with the approval of the Board, finally adopted N. J. A. C. 8:30-14.1 *et seq.*, entitled "Beds for Indigent Persons," and the regulation was published and took effect Febru- 9, 1978.

Appeals therefrom were filed by both the New Jersey Association and the Private Homes. The Division of Public Interest Advocacy was granted leave to intervene, and subsequently the Attorney General filed a motion to consolidate all the appeals, which was granted. A motion to stay implementation of the regulations was denied by the court.

The record before us amply demonstrates that N. J. A. C. 8:30-14.1 *et seq.* was adopted in an effort to alleviate the acute shortage of long-term care nursing home beds available for indigent persons in this State. Apparently, state-licensed nursing homes were largely unwilling to voluntarily accept and treat indigent patients. Although the State Medicaid program reimbursed qualified nursing homes which voluntarily accepted indigents for their care at standard rates, the homes could generally obtain greater fees from private paying patients than from Medicaid reimbursement. This fact led to the unwillingness of many private nursing homes to accept indigent persons. Consequently there developed a severe shortage of accommodations for indigents. Whereas it normally took one to three days for a private pay patient to find an available nursing home bed, it often required six to eight months for a Medicaid eligible patient. As a consequence of this acute shortage many Medicaid eligible patients needing nursing home care had to remain in their

homes or in general care hospitals or other institutions unsuited to their requirements for undue periods or indefinitely. Another critical situation was presented by the plight of paying patients who were forced to vacate when their financial resources were depleted (so-called "transfer-trauma").

Sometime in 1975 the then Director of the State Medicaid program wrote to the Department of Health inquiring whether Medicaid-financed beds could be required of nursing homes as a condition of licensure. In turn, the Department of Health requested a formal opinion on the matter from the Attorney General. At that time he advised that it could not legally "include in its health facility licensing standards a requirement that proprietary facilities accept and treat a certain number of indigent patients." The Attorney General further opined that such a regulation was not a proper subject of licensing regulations, which he said might deal only with a health facility's day-to-day physical, fiscal and professional operations.

In December 1976 the Public Advocate filed a Petition for Rule-Making with the Department of Health, requesting the Commissioner to adopt regulations requiring nursing homes to set aside a "fixed percentage of [their beds] to indigent persons" as a condition of state licensure. The Public Advocate criticized the Attorney General's opinion and urged that it not be followed. At first the Commissioner of Health stood on the Attorney General's advice and denied the request of the Public Advocate. Thereupon, the latter filed an appeal to this court challenging the validity of the Commissioner's determination that she lacked the authority to adopt the proposal. However, during the pendency of that appeal the Attorney

General rendered a second opinion reversing his earlier position. He now indicated that a requirement for the provision of a certain number of beds for indigent persons was consistent with the Department's authority, pursuant to N. J. S. A. 26:2H-12(b), to examine the rules and by-laws of a health care facility to ascertain that its rules are "fit and adequate" and that a licensee is in compliance with the act. Accordingly, the Commissioner drafted the prototype regulation and the Public Advocate voluntarily dismissed his appeal.

At an October 6, 1977 meeting of the Health Care Administration Board, representatives of the nursing home industry, who had already received copies of the proposed regulations prior to the meeting, were permitted to voice their objections to the Board before the regulations were officially published for public comment. After a lengthy discussion of the merits of the proposed regulations and some minor changes in language, the Board voted to approve them for initial publication.

Numerous comments, both in favor and critical of the regulations were received and considered by the Department of Health. Indeed, several of the comments led to the adoption of minor changes in order more fully to realize the intent of the regulations. For example, the term "percentage" in N. J. A. C. 8:30-14.4(a) as published on November 10, 1977 was changed to "reasonable number" to harmonize that section with N. J. A. C. 8:30-14.4(b). Moreover, the fact that many charitable, nonprofit and life care community nursing homes already previded extensive services to indigent patients and thereby met their fair share of the industry obligation to service indigents was recognized. See N. J. A. C. 8:30-14.4(a)(1). In order further to increase administrative flexibility, and prevent

the "transfer trauma," mentioned above, experienced by elderly patients when forced to leave a familiar nursing home, the Department was authorized to require facilities to maintain all present patients despite a change in their economic status and to include them in the fair share calculation under the regulation. N. J. A. C. 8:30-14.4(a).

Appellants argue that the challenged regulations go beyond the powers delegated to the Department of Health by its enabling legislation, N. J. S. A. 26:2H-1 *et seq.*, and are therefore *ultra vires*. Specifically, they contend that N. J. S. A. 26:2H-1 *et seq.* establishes two separate and distinct functions, one being planning and the other licensing, and that the Department's responsibility to insure that health care services are available to meet the needs of our citizenry is limited to the exercise of those functions. Moreover, it is argued that the licensing function applies exclusively to the quality of services afforded by nursing homes, such as conditions relating to the standards of patient care, while the planning function is similarly confined to the certificate of need process, which deals with proposed new facilities or expansion of existing facilities. It is argued that since the challenged regulations are relevant only to the function of passing on applications for certificates of need, not to the licensing function, they are *ultra vires* and invalid as conditions of licensure. This was essentially also the view of the Attorney General in his first formal opinion concerning the precursor to N. J. A. C. 80:30-14.1 *et seq.*

[1] I tis beyond dispute that N. J. S. A. 26:2H-1 *et seq.* neither expressly prohibits nor permits the regulations in question. However, in determining whether a particular administrative action enjoys statutory authorization, the reviewing court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved

by examining the entire statute in light of its origin and objectives. *New Jersey Guild of Hearing Aid Dispensers* v. *Long,* 75 N. J. 544, 562 (1978); *In re Suspension of Heller,* 73 N. J. 292, 303 (1977). The purpose of such an inquiry is to ascertain whether the requisite authority may be said to be implicitly supplied, as "[t]hat which is implied is as much a part of the law as that which is expressed." *Ibid. In re Gastman,* 147 N. J. Super. 101, 109 (App. Div. 1977).

[2] N. J. S. A. 26:2H-1 sets forth the policy of the Health Care Facilities Act as follows:

I. Licenses and Regulation

26:2H-1. Declaration of policy

It is hereby declared to be the public policy of the State that hospital and related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the State, the State Department of Health, which has been designated as the sole agency in this State for comprehensive health planning under the "Comprehensive Health Planning and Public Health Services Amendments of 1966" (Federal Law 89-749), as amended and supplemented, shall have the central, comprehensive responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services, and all public and private institutions, whether State, county, municipal, incorporated or not incorporated, serving principally as boarding nursing or maternity homes

or other homes for the sheltered care of adult persons or as facilities for the prevention, diagnosis, or treatment of human disease, pain, injury, deformity or physical condition, shall be subject to the provisions of this act. This section of the act imposed on the Department the comprehensive responsibility for developing and administering the legislative policy of insuring health care services that meet the needs of the citizenry of this State. As is evident, the declaration of legislative policy is not limited merely to the certificate of need or licensing functions. As the sole state agency charged with comprehensive health planning, the Department of Health must strive to achieve the objectives of the National Health Planning and Resources Development Act (42 U. S. C. A. § 300k *et seq.*), which includes equal access by all people to quality health care services. See 42 U. S. C. A. § 300k (a)(1) (Supp. 1974-1977).

[3-5] It is well settled that declarations of public policy in enabling legislation can serve as sources of authorization for regulations related to the furtherance of that policy. *In re Promulgation of Rules of Practice,* 132 N. J. Super. 45, 49 (App. Div. 1974), certif. den. 67 N. J. 95 (1975). This is especially true where, as here, the declaration of legislative policy is couched in such broadly comprehensive terms. *Ibid.* Moreover, the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities, and the courts should readily imply such incidental administrative powers as are necessary to effectuate fully the legislative intent. *New Jersey Guild of Hearing Aid Dispensers* v. *Long, supra; In re Suspension of Heller, supra.* Where, as here, the task of the administrative agency is "to protect the health and

welfare of members of the public" a grant of implied powers is to be readily inferred. *Cf. In re Suspension of Heller, supra,* 73 N. J. at 303-304.

[6] If the Department of Health has the authority pursuant to N. J. S. A. 26:2H-1 to promulgate regulations requiring health providers to deliver needed services, then it follows in our view that it may employ its licensing function to enforce those regulations. Indeed, N. J. S. A. 26:2H-13 provides, in pertinent part, that the Department may revoke a license for failure to comply "with the provisions of this act, or the rules and regulations promulgated hereunder." See also, N. J. S. A. 26:2H-12 (b)(2), which provides, among other things, that a license shall be issued by the Department upon its findings that "there is reasonable assurance the health care facility will be operated in the manner required by this act and the rules and regulations thereunder."

[7] Application of the foregoing principles to the appellants' challenge of the insant regulations on *ultra vires* grounds confirms that the regulations do not exceed the authority delegated to the Department of Health by the act. The extremely circumscribed scope of the statutory purposes implicit in appellants' position hardly comports with the liberal construction mandated for administrative regulations in the field of public health and welfare. *In re Suspension of Heller, supra,* 73 N. J. at 303-304.

Appellants next contend that the regulation takes their property for a public use without just compensation. The general thrust of their argument is that the challenged regulations require them to provide beds for indigents—a public purpose—at the expense of their right to sell their services on the open market for what the traffic will bear.

Appendix B

[8-10] The general question as to when governmental action amounts to a taking of property has always presented a "vexing and thorny problem." *Washington Market Enterprises* v. *Trenton,* 68 N. J. 107, 116 (1975). Indeed, a determination of where valid regulation ends and taking begins is not capable of any set formula or definition but must turn on the facts in each case. *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *Bayshore Sew. Co.* v. *Dep't of Environment,* 122 N. J. Super. 184, 204-205 (Ch. Div. 1973), aff'd o. b. 131 N. J. Super. 37 (App. Div. 1974). However, the constitutional purpose is clear. If there has been a taking, both the Federal and State Constitutions require the payment of just compensation. U. S. Const., Amends. V and XIV; N. J. Const. (1947), Art. I, § 20. Conversely, if there has not been a taking, any loss that may be suffered as incident to governmental action under the police power is *damnum absque, injuria. Washington Market Enterprises, supra,* 68 N. J. at 116. Moreover, the burden of proof rests "heavily" upon the parties alleging confiscation to demonstrate it. *Hutton Pk. Gardens* v. *West Orange Town Council,* 68 N. J. 543, 570 (1975).

In order to demonstrate that the challenged regulations effect a taking without just compensation, appellants rely on cases where there were takings of private property for public use for no or nominal compensation, *Phillips Petroleum Co.* v. *Corporation Comm'n of Oklahoma,* 312 P. 2d 916 (Okl. Sup. Ct. 1957); *Capital Transit Co.* v. *Bosley,* 191 Md. 502, 62 A. 2d 267 (Ct. App. 1948), or where regulatory measures were held to be confiscatory despite the fact that the private property involved was not rendered totally useless. *Armstrong* v. *United States,*

364 U. S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960); *Washington Market Enterprises* v. *Trenton, supra.* However, those cases are inapposite to the instant case since N. J. A. C. 8:30-14.1 *et seq.* has built-in safeguards against compelled use of the regulated homes without just compensation.

N. J. A. C. 8:30-14.5(c) specifically provides that the affected nursing homes "shall be entitled to a reasonable rate for Medicaid patients" consistent with established Medicaid reimbursement procedures. Moreover, even after an initial determination has been made that a nursing home facility must make available a specified number of its beds for indigents, the home is entitled to a plenary hearing at which it may submit a detailed cost analysis substantiating a position that it cannot earn a just and reasonable return on its equity if required to accept that number of indigents. N. J. A. C. 8:30-14.5(d)(i). If the final administrative decision is adverse to the nursing home, it has the right to judicial review. N. J. S. A. 26:2H-17. Thus, it is abundantly clear that the challenged regulations are at pains to provide adequate assurance against unfair or confiscatory treatment of the homes.

[11-14] Concededly the challenged regulations may prevent a nursing home from obtaining the maximum return available in an unregulated market. But that fact does not render the regulations invalid. Not every state action which interferes with an individual's unrestricted use of his property is confiscatory; it is elementary that many governmental regulations which necessarily "restrict property rights and the freedom of contract" have been sustained as valid exercises of the police power. *Roth-*

man v. *Rothman*, 65 N. J. 219 (1974). It is well settled that laws and regulations relating to the health, comfort, convenience, good order and general welfare of the citizenry, though they may disturb the plenary enjoyment of individual property rights, may be valid though no provision is made for compensation for such disturbance. *State* v. *Mundet Cork Corp.*, 8 N. J. 359, 369-370 (1952). As indicated above, the instant regulations specifically provide for compensation for use of the facilities. In any event, governmental control and regulation of rates in appropriate areas affected with the public interest, if reasonable, is well within the State's comprehensive police powers. *Hutton Pk. Gardens* v. *West Orange Town Council*, 68 N. J. 543 (1975) (rent control); *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504 (E. & A. 1935) (milk prices); *Dock Watch Hollow Quarry Pit* v. *Warren Tp.*, 142 N. J. Super. 103 (App. Div. 1976), aff'd o. b. 74 N. J. 312 (1977) (restriction on quarrying below a certain grade).

It is beyond dispute that the challenged regulations were intended to remedy a social problem affecting the health and welfare of the aged and infirm poor. The area of concern is indeed one affected with a public interest sufficient to invoke the protective umbrella of this regulation.

Appellants next contend that N. J. A. C. 8:30-14.1 *et seq.* is manifestly vague and ambiguous in that it lacks definite standards as to how and under what circumstances they will be reimbursed and how many indigents they will be required to accept. In particular, objection is taken to such terms as "reasonable number of beds," "reasonable number of indigents" and "reasonable rates" N. J. A. C. 8:30-14.4(a), 14.5(3)(c), respectively.

..

[15] The basic principle here pertinent is that a statute is bad only if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application. *State* v. *Smith,* 46 N. J. 510, 518 (1966); *Handelsman* v. *N. J. Real Estate Comm'n Dir.,* 101 N. J. Super. 244, 248 (App. Div. 1978), certif. den. 52 N. J. 485 (1968). Although these cases concern statutes, the same standards are applicable to the validity of administrative regulations. *Essex Cty. Welfare Bd.* v. *Klein,* 149 N. J. Super. 241, 247 (App. Div. 1977); *Hoeganaes Corp.* v. *Div. of Taxation Dir.,* 145 N. J. Super. 352, 359 (App. Div. 1976).

Within the confines of specificity discussed above, it is recognized that regulations of certain kinds of subject matter and statutes must of necessity be general. *Hoeganaes Corp.* v. *Div. of Taxation Dir., supra,* 145 N. J. Super. at 360. This is such an area. Thus such standards as "just and reasonable," "fair return," and "excessive profits" have been approved by the courts in other comparable regulatory contexts. *Ward* v. *Scott,* 11 N. J. 117, 124-125 (1952); *State* v. *Owens-Corning Fiberglas Corp.,* 100 N. J. Super. 366, 383 (App. Div. 1968), aff'd o.b. 53 N. J. 248 (1969). *Hutton Pk. Gardens* v. *West Orange Town Council, supra* 68 N. J. at 568-570.

[16] In respect of the contentions as to vagueness of the regulations, it has been conceded by the Attorney General at oral argument that a nursing home which is unable to qualify for Medicaid cannot be denied licensure if it refuses to accept indigents as it is the intention of the regulation that only Medicaid-eligible patients are required to be accepted by a nursing home under the regulation. While we are conscious of the concern of the homes that Medi-

caid reimbursement may not equal the cost of maintaining an indigent, we do not regard this circumstance as fatal to the scheme of the regulation where a licensee cannot establish that its overall operation yields it less than a "just and reasonable return on equity." N. J. A. C. 8:30-14.4(b)(6)(i). We see nothing invidious in the notion that to establish such a return the home may have to charge its paying patients sufficient to enable it to carry a reasonable number of Medicaid patients.

[17] Finally, appellants argue that the lack of specific subordinate criteria for determination of the "reasonable number" of beds for indigents required by the Department of a particular facility invalidates the regulation. We think not. The regulation sets forth a number of relevant factors to be weighed in arriving at the determination in a particular case. These include the extent and location of bed shortage, the length of time indigents must wait for nursing home placement, the state health plan and the plans of the various Health Systems Agencies, the ability of the home to make a reasonable profit if required to accept a particular number of indigents and other facts. N. J. A. C. 8:30-14.4(b). From the nature of the problem and the variables in attendant circumstances affecting different nursing homes, we conclude the regulatory provisions are fair, reasonable and practicable. That they are not impeccable specimens of draftsmanship does not impugn their legality. The procedural and judicial safeguards available against arbitrary determinations under the regulation go far to support its validity. *Cf. Motyka* v. *McCorkle*, 58 N. J. 165, 178 (1971); *State* v. *Trap Rock Industries, Inc.*, 116 N. J. Super. 353, 857 (App. Div. 1971).

We have carefully considered other objections offered against the validity of the regulation and find them without merit.

The regulation under challenge is adjudged valid. No costs.

APPENDIX C

Relevant Administrative Regulations

SUBCHAPTER 14. BEDS FOR INDIGENT PERSONS

Authority

Unless otherwise expressly noted, all provisions of this subchapter were adopted pursuant to authority of N.J.S.A. 26:2H-1 et seq. and were filed and became effective on January 24, 1977, at R. 1978 d.25. See: 9 N.J.R. 516(a), 10 N.J.R. 62(d).

8:30-14.1 Purpose

The purpose of these rules is to protect and promote the health and welfare of those indigent persons whose health is now or will be in danger because of the acute long-term care bed shortage for the indigent in the State, by requiring all long-term care facilities as a condition for renewal of or for issuance on an operating license to accept and care for indigent persons.

8:30-14.2 Scope

All long-term care facilities under the jurisdiction of the Department of Health are subject to these regulations.

8:30-14.3 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"Department" means the Department of Health.

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"Indigent person" means a person participating in the State Medicaid program and certified as needing nursing care, or a person who could meet the eligibility requirements for receiving nursing care under the State Medicaid program.

"Long-term care facility" means an institution or a distinct part of an institution which is licensed by the New Jersey State Department of Health to provide health care under medical supervision for 24 or more consecutive hours to two or more patients who are not related to the governing authority or its members by marriage, blood or adoption. A long-term care facility may be either a skilled nursing facility, where patients receive 2.75 hours of nursing care daily, or intermediate care facility, where patients receive less than 2.75 hours of nursing care daily.

8:30-14.4 Procedures; renewal of license; initial application for a license

(a) An applicant seeking or renewing a license as a long-term care facility may be required by the department to make available a reasonable number of its beds to indigent persons. Such requirement shall constitute a condition of licensure. As an alternative to requiring a reasonable number of indigents, the department may require a facility to maintain all patients regardless of a change in their economic status. The department shall notify the facility of the requirement to make available a percentage of its beds to indigent persons 90 days prior to the renewal of a license or upon application for a license for a new facility.

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1. The Department of Health shall presume that a charitable and/or nonprofit long-term care facility is meeting its fair share of providing a reasonable number of beds for indigents if such long-term care facility has a policy of accepting patients without regard to economic status and a policy of maintaining patients regardless of a change in their economic status. If implementation of such policy is documented to the satisfaction of the department, no requirement shall be imposed.

2. No requirement shall be imposed by the Department of Health on a life care community facility which has contracted with its own residents for prior rights to beds in the long-term care facility.

(b) In determining whether to require a long-term care facility to provide a reasonable number of its beds for indigent care or requiring a facility to maintain all patients regardless of their economic status, the department shall consider but not be limited to the following information:

1. Whether there currently exists a long-term care bed shortage for indigent persons, and if so, the extent and location of the shortage;

2. The State health plan or the plans of the appropriate systems agencies;

3. The length of time indigent persons must await for placement of long-term care facility;

4. The costs of providing care to indigent persons in need of nursing care to other health care providers;

5. Whether the nursing home would be able to make a just and reasonable rate on equity if required to accept and care for indigent persons;

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6. Whether a certificate of need granted for a new, expanded or modernized long-term care facility included a commitment to provide a specified number of beds for indigent persons.

i. Any nursing home which feels it cannot make a just and reasonable rate on equity if required to accept indigent persons may request an administrative review of that decision at least 60 days prior to the date for renewal of its license, at which time the facility shall submit to the department a detailed cost analysis substantiating its claim.

ii. If, after an administrative review of the decision, the department finds against the long-term care facility, it shall notify the facility within 30 days of the date for renewal of its license.

iii. Consistent with the Administrative Procedure Act and chapter 136 (Health Care Facilities Planning Act of 1971), the long-term care facility may ask for an administrative hearing within 30 days of the revocation notice from the department.

iv. Applicants for licensure of a new facility shall have the same opportunity for an administrative review and for a hearing on the non-issuance of a license.

8:30-14.5 Obligations and rights of the long-term care facility

(a) If the department imposes a requirement on the application for or renewal of a license, the long-term care facility in question shall make each succeeding vacant bed available to indigent persons until it reaches

the maximum number of indigent persons required by the department.

(b) A nursing home shall have the right to refuse to accept a particular indigent patient if:

1. The home does not provide the type of services appropriate for the patient's needs; or

2. The patient may present a danger to himself or others if placed in the home;

3. This right of refusal shall not relieve the nursing home of its obligation to fill the vacancy with an indigent person.

(c) The long-term care facility shall be entitled to a reasonable rate of Medicaid patients consistent with cost and rate evaluation (CARE) system administered by the department on behalf of the Medicaid program.

8:30-14.6 Placement

(a) The department shall not be responsible for placing indigent persons in long-term care facilities.

(b) If the department imposes a requirement on the application for or renewal of a long-term care facility license, it shall forward its determination to the State Medicaid office and shall make its determination available upon request to any governmental agency, provider, provider association, planning agency, citizen or citizen's group.

Appendix C

8:30-14.7 Remedies

(a) The department shall receive complaints regarding violations of these regulations from any source which may attempt unsuccessfully to place an indigent person.

(b) The department may revoke, suspend or take any other appropriate action against the license of a long-term care facility for intentional and willful violation of these regulations.

(c) The department may refuse to issue a temporary permit or license to any applicant for long-term care facility for intentional and willful violation of these regulations.

APPENDIX D

Notice of Appeal to the Supreme Court of the United States

(Filed—June 27, 1980)

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY

A-83/84 September Term 1979

In the Matter of the Review of Administrative Promulgation of the HEALTH CARE ADMINISTRATION BOARD: N.J.A.C. 8:30-14.1 through 8:30-14.6.

NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES, a corporation not for profit of the State of New Jersey, and WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF-LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, and the HEALTH CARE ADMINISTRATION BOARD,

Respondents,

and

PUBLIC ADVOCATE OF NEW JERSEY,

Intervenor-Respondent.

Appendix D

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed—June 27, 1980)

Notice is hereby given that plaintiffs, Wayne Haven Nursing Home, Valley Nursing Home, Pine Rest Nursing Home, Dunroven Nursing Home, Allendale Nursing Home, Wellington Nursing Home and Woodcliff Lake Manor Nursing Home, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, affirming the constitutionality of the administrative regulations adopted by the defendant, New Jersey Commissioner of Health, with the approval of the defendant, Health Care Administration Board, N.J.A.C. 8:30-14.1 through 8:30-14.6, entered in this action on May 28, 1980.

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

CONNELL, FOLEY & GEISER
Gateway I
Newark, New Jersey 07102
(201) 643-2060
Attorneys for Appellants, Wayne Haven Nursing Home, Valley Nursing Home, Pine Rest Nursing Home, Dunroven Nursing Home, Allendale Nursing Home, Wellington Nursing Home, Woodcliff Lake Manor Nursing Home
By: ADRIAN M. FOLEY, JR.

No. 80-301

Supreme Court, U. S.
FILED
SEP 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES JOANNE E. FINLEY AND HEALTH CARE ADMINISTRATION BOARD TO DISMISS OR AFFIRM

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Appellees, Joanne E. Finley, M.D., State Commissioner of Health and the Health Care Administration Board,
State House Annex,
Trenton, New Jersey 08625.
(609) 292-6598

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

ANDREA M. SILKOWITZ,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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No. 80-301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES JOANNE E. FINLEY AND HEALTH CARE ADMINISTRATION BOARD TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(b) and (d) of the Court, the Attorney General of the State of New Jersey, on behalf of appellees, Joanne E. Finley, State of New Jersey Commissioner of Health, and the Health Care Administration Board, hereby moves to dismiss this appeal or affirm the

judgment of the Supreme Court of New Jersey on the ground that the constitutional questions raised by appellants are so insubstantial as to obviate further argument.

Counterstatement of the Case

There exists currently in the State of New Jersey an acute shortage of long term care facilities which are willing to provide skilled and intermediate level nursing care to indigent persons (Aa3).* As a result many aged poor individuals are compelled to wait, often for almost a year, in their homes, general care hospitals or other institutions where they are unable to obtain the care they require (Aa4). Additionally, individuals who have utilized private resources to obtain care in long term care facilities are forced to vacate these institutions once their limited resources are depleted (*Ibid.*).

In response to this intolerable health situation, the Commissioner of the New Jersey Department of Health, who is authorized by N.J.S.A. 26:2H-12(b) to license all long term care facilities in the State, adopted with the approval of the State Health Care Administration Board regulations requiring as a condition of licensure a home's acceptance of a "reasonable" number of indigent (therein defined as Medicaid eligible) persons or alternatively, maintenance of Medicaid eligible patients no longer able to pay fully the costs of nursing care. N.J.A.C. 8:30-14.4 (Aa35). In order to assure a flexible approach to individual circumstances, no set formulas were incorporated into the regulation. Instead, the regulation provides that when determining whether to require a nursing home to pro-

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* Aa as used throughout refers to the appendix to the Jurisdictional Statement filed by appellant with this Court.

vide beds for indigent care, the Department would consider whether and where an indigent bed shortage existed, the geographic origin of indigents in need of care, the length of time preceding placement, the costs of providing indigent care borne by other providers, such as hospitals, and whether the nursing facility "would be able to make a just and reasonable rate on equity if required to accept and care for indigent persons." N.J.A.C. 8:30-14.4(b)(1)-(5) (Aa36). Furthermore, the regulations establish a three-tiered review procedure (informal administrative review of a detailed cost analysis, quasi-judicial hearing and appellate court review), see N.J.A.C. 8:30-14.4 (b)(6)(i)-(iii) (Aa37) and N.J.S.A. 26:2H-17, in which the facility can challenge a determination by the Department that it could achieve a just and reasonable rate on equity if required to accept a specified number of indigent patients.

Appellants, who are licensed as long term care facilities by the Department of Health and are thereby subject to the requirements of N.J.A.C. 8:30-14.1 *et seq.*, filed a Notice of Appeal from the promulgation of the regulation in January 1978 with the Superior Court of New Jersey, Appellate Division. In a comprehensive decision delivered by that Court on May 1, 1979, the regulations were upheld as consistent with the statutory powers delegated to the Commissioner of the Department of Health (Aa25). The Appellate Division further rejected the appellants' facial challenge to the regulations as effecting an unconstitutional taking of their property without compensation on the grounds that the homes were assured a "reasonable rate" if they participated in the Medicaid program, see N.J.A.C. 8:30-14.5(c), and were otherwise afforded the opportunity to demonstrate before the Department of Health and thereafter the courts, their inability

to earn a just and reasonable return on equity if compelled to accept indigent patients, N.J.A.C. 8:30-14.5(d)(i) (Aa30). To the extent that these regulations conceivably would not enable the homes to obtain the maximum return available in an unregulated market, the Court concluded that such a result was not confiscatory and thereby violative of constitutional protections since a significant public objective—remedying of a social problem affecting "the health and welfare of the aged and infirm poor"—was concomitantly advanced (Aa30 to Aa31).

The Supreme Court of New Jersey thereupon granted appellants' Petition for Certification to the Superior Court of New Jersey, Appellate Division. 81 N.J. 330, 407 A.2d 1204 (1979). The American Health Care Association, a non-profit association of long term care facilities, moved on June 29, 1979 to join as *amicus curiae* in the appeal to raise an issue not presented by the appellants: namely, whether N.J.A.C. 8:30-14.1 *et seq.* violated the provisions of Title XIX of the Social Security Act as amended, 42 U.S.C. §1396 *et seq.* The motion to file an *amicus curiae* brief as to this issue was granted by the Supreme Court of New Jersey on July 10, 1979.

In a decision rendered on May 28, 1980, the Supreme Court of New Jersey concluded that N.J.A.C. 8:30-14.1 *et seq.* was "directed at an acute social problem affecting the welfare of the needy, aged and infirm, [was] well within the power and authority vested in the Department by the Legislature and [did] not constitute a taking of private property without just compensation (Aa13; see also Aa8 to Aa12). As to the Supremacy Clause issue raised by the *amicus curiae,* the Court determined that the regulation did not compel nursing homes' participation in the Medicaid program (Aa17). To the extent that it strongly encouraged participation in the program how-

ever, the Court determined that such prompting would be "in furtherance of [Title XIX's] broad social objectives." (Aa17).*

On June 27, 1980, appellants filed a Notice of Appeal with the Court pursuant to 28 U.S.C. §1257(2). Appellees have filed the within motion to dismiss or alternatively, to affirm on the grounds that no substantial federal constitutional question is raised by this appeal.

ARGUMENT

This case presents no substantial constitutional questions not previously decided by this Court.

By this appeal, appellants seek, in effect, to thwart the efforts of the New Jersey Commissioner of Health to prevent nursing homes which enjoy a monopoly position with regard to available nursing care from discriminating against the aged poor in dire need of such care. In so doing they do not proffer any substantial constitutional claims. Rather, they urge in a facial challenge to the regulation a contention as to a confiscatory taking of private property without legal or factual support as well as a Supremacy Clause violation claim expressly rejected by the federal administering agency of the Medicaid program. Since the Supreme Court of New Jersey has comprehensively and properly addressed these issues and because no issues of any constitutional significance are presented herein, the appeal should be dismissed or in the alternative, the judgment below should be affirmed.

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* In support of this conclusion the Court referred to a letter from the then Department of Health, Education and Welfare Region II in which the federal Medicaid administering agency concluded that the regulation "on its face violates no provision of the [Federal] Medicaid statute. . . ." (Aa18).

A. The requirement that quasi-public facilities enjoying a monopoly position with regard to available nursing care accept where financially feasible a reasonable number of indigent patients is a proper and legitimate exercise of the State's police power and does not effect a taking of these facilities' property.

The Health Care Facilities Planning Act (N.J.S.A. 26:2H-1*et seq.*) was enacted in 1971 to ensure that "hospital and related health care services of the highest quality [and] demonstrated need [are] efficiently provided and properly utilized at a reasonable cost." N.J.S.A. 26:2H-1. Pursuant to the Act, the State Department of Health has been delegated the central, comprehensive responsibility to develop and administer the State's policy with regard to all public and private health care facilities, statutorily defined as including nursing homes, in order to promote and protect the health of *all* inhabitants of the State. N.J.S.A. 26:2H-1. As the sole agency in New Jersey for comprehensive health planning, the Department must strive in addition to achieve the objectives of the National Health Planning and Resources Development Act (42 U.S.C. §300k *et seq.*), which includes ensuring equal access of all people to quality health care services. See 42 U.S.C. §300k(a)(1).

Under these Acts nursing homes, like hospitals and other health care facilities, have been afforded a "special status." *Doe* v. *Bridgeton Hospital Ass'n Inc.*, 71 N.J. 478, 487, 366 A.2d 641, 646 (1976), *cert.* denied 433 U.S. 914 (1977). In order to avoid an unnecessary duplication of health care services, a new nursing home may not operate without first demonstrating to the Commissioner of Health through the certificate of need review process the existence of a need for additional nursing services. N.J.S.A. 26:2H-1; N.J.S.A. 26:2H-8. In essence, licensed nursing

homes enjoy a lawful monopoly over the delivery of intermediate and skilled nursing care, and it is, therefore, implicit under the Acts that such facilities must fully serve the public interest in their approved area or region. *Doe* v. *Bridgeton Hospital, supra* at 486, 366 A.2d at 645. Indeed, by promulgating the Health Care Facilities Planning Act, the Legislature has recognized that hospitals and other health care facilities, such as nursing homes, "must serve the public without discrimination. *Their boards of directors or trustees are managing quasi-public trusts and each has a fiduciary relationship with the public.*" *Id.* at 487, 366 A.2d at 647 (emphasis supplied). As such, these facilities are subject to extensive regulation by the State to ensure that adequate and proper health services are made available to the public (Aa10). In the present situation where an acute shortage of nursing home beds for indigents prevails, the Commissioner of Health, consistent with the statutory objectives of ensuring access of all persons to health services, has properly mandated that nursing homes where financially feasible accept a reasonable number of indigents.

A facility's obligation under the regulation to accept indigent patients and thereby either the Medicaid *per diem* rate or the patients' available income only arises, however, where the Department determines that a home can still achieve a just and reasonable return on its equity. N.J.A.C. 8:30-14.4(b)(5). Although it is conceivable, though certainly not demonstrated in this matter, that some facilities may thereby be unable to maintain a maximum profit level, that result clearly does not constitute, as appellants assert, a confiscatory taking of their property. As the Court has repeatedly recognized, the State may validly interpose its authority on behalf of the public in regulating the use of private property where, as here, the interests of the public require such interference and the

means utilized are reasonably necessary to accomplish that objective. *Lawson* v. *Steele,* 152 U.S. 133, 137 (1894). Under such circumstances, a property owner constitutionally may be deprived of the most profitable use of his property without fiscal consequence to the State. *Andrus* v. *Allard,* 444 U.S. 51 (1979); *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Village of Euclid, Ohio* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915).*

Although the Court has recognized that under special circumstances interference with a property owner's right to exclude others from his property might require governmental compensation, see *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), but compare *Pruneyard Shopping Center* v. *Robins,* —— U.S. —— (1980), such a conclusion under the facts of this case is unwarranted. Unlike the case presented in *Kaiser,* where the government sought to effect public access to property deemed to be private under the laws of Hawaii, the instant regulation promotes the access of indigents to facilities which under State law are considered quasi-public in nature. See Aa10. As recognized in *Doe* v. *Bridgeton Hospital Assn., supra,* an essential attribute of such quasi-public institutions is the inability to discriminate and to deny necessary treatment. In clear distinction from the *Kaiser* marina owner, the appellants' rights in their property therefore do not extend to exclusion of the public. Moreover, and as in the *Pruneyard* case, the government's encouragement of public ac-

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* As the Court recently noted in *Andrus* v. *Allard, supra* at 66, because the "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform [and] . . . because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

cess will be of minimal, if any, financial detriment to appellants, since they are assured a fair and reasonable return on their equity in the property. Finally, since nursing homes are heavily regulated by the State through its licensure powers in assuring that proper care is provided, their profit expectations cannot be reasonably equated with that of the *Kaiser* marina operators. On balance therefore the financial burdens, if any, imposed by the regulation are properly borne, as are other licensure requirements, by the nursing home. In these circumstances a confiscatory taking of property obviously has not occurred. See *Goldblatt* v. *Town of Hempstead, supra* at 594.

B. Appellees' enforcement of N.J.A.C. 8:30-14.1 *et seq.* would not violate any provision of Title XIX of the Social Security Act.

Moreover, contrary to appellants' contentions and as the Supreme Court of New Jersey concluded (Aa17), N.J. A.C. 8:30-14.1 *et seq.* neither by its own terms nor as a practical matter compels a nursing home's participation in the State's Medicaid program. Indeed the sole connection between the challenged regulation and the Medicaid program is that the term "indigent person" used in the regulation encompasses Medicaid recipients as well as any "person who could meet the eligibility requirements for receiving nursing care under the State Medicaid Program" (Aa35). As so defined, nursing homes as a condition for renewal or issuance of an operating license could satisfy the provisions of N.J.A.C. 8:30-14.1 *et seq.* without ever becoming a Medicaid provider by accepting or retaining patients in need of nursing care who would satisfy the categorical and financial conditions of eligibility for New Jersey's Medicaid program set forth in N.J.S.A. 30:4D-3(f) and N.J.A.C. 10:94-3.9(a). Thus, a clear choice exists for

a nursing home operator who is disinclined to participate in the Medicaid program: namely, to accept as payment of the care provided a Medicaid eligible individual the sometimes significant monthly financial resources available to him. Appellants' claims therefore of compulsory participation in the Medicaid program are without basis.

However, even assuming that the operation of N.J.A.C. 8:30-14.1 *et seq.* strongly encouraged participation in the Medicaid program, this result would not be incompatible with any express provisions of Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, or Congressional policies therein. Indeed, enforcement of the regulatory policy would advance several salutory provisions of the Act.

The federal Medicaid program was enacted into law on July 30, 1965, in order to assist states through the provision of substantial federal monies to provide health services to indigent individuals and families. See 42 U.S.C §1396a(a)(10). As a condition of the receipt of these federal monies participating states must agree to implement a medical assistance program in accordance with the terms set forth in 42 U.S.C. §§1396a(a)(1)-(40), including the requirement that provision be made for the "payment of part or all of the cost . . ." of skilled and intermediate care nursing services 42 U.S.C. §1396a(a)(10)(A); 42 U.S.C. §1396d(a). Notably, however, no provision of Title XIX expressly prohibits participating states from encouraging or compelling providers of such care to join its Medicaid program.

The sole provisions of the Act which do refer to the providers of such care are quite limited in scope, and contrary to appellants' contentions, are wholly unrelated to the issue *sub judice*. For example, 42 U.S.C. §1396a(a)(23), which mandates that "any individual eligible for

medical assistance . . . may obtain such assistance from any institution, agency, . . . or person, qualified to perform the service or services required . . .", is clearly designed to benefit the Medicaid recipient rather than the provider by assuring each "recipient a free choice among qualified providers of medical assistance and to guarantee that the state will not dictate to any Medicaid recipient where he or she must receive treatment." *Briarcliff Haven, Inc.* v. *Dept. of Human Resources,* 403 F.Supp. 1355, 1362 (N.D. Ga. 1975). In so doing Congress has attempted to make medical services available to the needy in the same fashion as they are available to all others. See *Rush* v. *Parham,* 440 F.Supp. 383, 389 (N.D. Ga. 1977), app. pending *sub nom. Rush* v. *Poythress,* No. 77-2743 (5th Cir.). See also S. Rep. No. 404, 84th Cong. *reprinted in* [1965] U.S. Code Cong. & Admin. News 1943, 1965. Similarly, 42 U.S.C. §1396a(a)(27)'s requirement that providers sign "agreements" *agreeing* "(A) to keep such records as are necessary fully to disclose the extent of the services" provided Medicaid recipients, and (B) to furnish the State agency with such payment information "as the State agency may from time to time request" simply addresses a Congressional concern repeated throughout the Act (see 42 U.S.C. §§1396a(a)(26), (30) and (31)) that the State have available the means to determine whether overutilization of services has occurred or improper claims for reimbursement have been submitted.

Although a few basic minimum requirements for State participation do exist, the primary thrust of the federal Medicaid legislation is to afford a participating state considerable latitude in molding a medical assistance program in accordance with reasonably perceived needs of its indigent communities and within the limitations of prevailing budgetary constraints. See *Beal* v. *Doe,* 432 U.S. 438 (1977); 42 U.S.C. §1936. See also *Quern* v. *Mandley,* 436

U.S. 725 (1978); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973). In other federal welfare programs where such broad discretion has been afforded participating states, the Court has ruled that any intention by Congress to supercede the exercise of State power must be expressly stated. *New York State Dept. of Social Services* v. *Dublino, supra* at 413. Moreover, the "exercise of federal superiority is not lightly to be presumed." *Ibid.,* quoting *Schwartz* v. *Texas,* 344 U.S. 199, 202-203 (1952). Clearly, appellants' failure to cite any significant provisions of Title XIX or refer to any definitive section of the Title's legislative history addressing the issue of the State's authority to compel provider participation can scarcely satisfy the demanding criterion of establishing federal pre-emptive intent.

Moreover, *Dublino* requires that the construction of the statute advanced by the federal agency charged with its execution "should be followed unless there are compelling indications that it is wrong. . . ." *Id.* at 699 quoting from *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). See also *Quern* v. *Mandley, supra* at 738; *Beal* v. *Doe, supra* at 447; *Yoakim* v. *Miller,* 425 U.S. 231, 235-236 (1976). Significantly, the federal Department of Health and Human Services has concluded herein that the regulation challenged "violates no provision of the [federal] Medicaid statute." (Aa18). Again in the absence of any affirmative persuasive showing by appellants that this interpretation of Title XIX is plainly incorrect, substantial deference should be granted to the federal agency's opinion.*

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* Clearly, appellants' reliance on dictum in *Briarcliff Haven, Inc.* v. *Department of Human Services, supra* at 1362-1364 cannot overcome the presumptive correctness of the federal administrative

(Footnote continued on following page)

Appellees submit that by encouraging more providers to participate in the Medicaid program through the enforcement of N.J.A.C. 8:30-14.1 *et seq.* the State effectuates the primary purpose of the federal legislation in providing necessary medical care to indigent persons. Additionally, the State's actions to increase the range of providers fosters the statutory goal of insuring a wide and free choice of providers' services. See 42 U.S.C. §1396a(a)(23). To the extent that effectuation of these goals may adversely affect nursing homes' efforts to maximize their profits through exorbitant rates, that result is permissible. See *Case* v. *Weinberger,* 523 F.2d 602, 607 n. 11 (2d Cir. 1975).*

For these reasons, therefore, it is evident, as the Supreme Court of New Jersey concluded, that the regulatory requirement that nursing homes as a condition of licensure and where financially feasible accept a reasonable number of indigents does not constitute a confiscatory taking of appellants' property and is not violative of any requirement of Title XIX of the Social Security Act. Accordingly, it is evident that no substantial constitutional questions are presented and thus the appeal should be dismissed or alternatively the judgment of the Supreme Court of New Jersey should be affirmed.

(Footnote continued from preceding page)

agency's construction. That Court's cited remarks obviously reflect recognition of the fact that until promulgation of N.J.A.C. 8:30-14.1 *et seq.* states had determined individually that making provider participation voluntary would attract sufficient providers. These statements do not address, no less decide, the issue of State discretion under the federal Medicaid Act to require as a condition of licensure, that a provider serve the aged poor.

* The insubstantiality of appellants' Supremacy Clause argument is further demonstrated by the fact that appellants determined not to raise the issue in the proceedings below. The issue was only presented to the Supreme Court of New Jersey by the *amicus curiae,* American Health Care Association.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal should be dismissed for want of a substantial federal constitutional question which would require plenary consideration by this Court or alternatively the final decision of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Appellees, Joanne E. Finley, M.D., State Commissioner of Health and the Health Care Administration Board.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

ANDREA M. SILKOWITZ,
Deputy Attorney General,
On the Brief.

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-301

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE PUBLIC ADVOCATE TO DISMISS

STANLEY C. VAN NESS, PUBLIC ADVOCATE
BY: CARL S. BISGAIER, Director
Division of Public Interest Advocacy
Department of the Public Advocate
COUNSEL FOR APPELLEE
Post Office Box 141
520 East State Street
Trenton, New Jersey
(609) 292-1692

Of Counsel and
On the Brief:

ARTHUR PENN
Assistant Commissioner
Department of the Public Advocate
September 25, 1980

SERRAO ASSOCIATES
Trenton, New Jersey 08618
(609) 883-7979

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Appellees.

On Appeal from the
Supreme Court of New Jersey

MOTION OF APPELLEE PUBLIC ADVOCATE TO DISMISS

The Appellee Public Advocate moves the Court to dismiss the appeal herein on the ground that this case does not present a substantial federal question.

I.

THE NATURE OF THE CASE

A. The State Regulation Involved

This appeal raises the question of the facial validity of a state administrative regulation, N.J.A.C. 8:30-14.1 to 14.7. Appellants claim that the regulation on its face takes their property without just compensation in violation of the Takings Clause of the Fifth Amendment to the Constitution of the United States.

This regulation was adopted by the State Commissioner of Health with the approval of the State Health Care Administration Board, after due notice and opportunity to be heard. It has been operative since January of 1978.

Essentially, the regulation requires all newly constructed or existing state licensed nursing homes to make available a "reasonable" number of its beds to indigent persons as a condition of licensure. N.J.A.C. 8:30-14.4(a). The term "indigent" is defined as a person meeting Medicaid eligibility standards, N.J.A.C. 8:30-14.3, thus enabling the nursing homes to obtain reimbursement from the Medicaid program. Pursuant to the regulatory scheme, the State Department of Health determines the number of beds each nursing home must provide to indigent patients. There is an opportunity for agency review should a nursing home disagree with the number of beds it was required to provide, N.J.A.C. 8:30-14.4(b) (i to iv). A key element of the regulation is the provision that a nursing home need not accept indigents if it can demonstrate that it could not make a "just and resonable rate on equity", N.J.A.C. 8:30-14.4(b)(i).

The expressed purpose of the regulation "is to protect and promote the health and welfare of those indigent persons whose health is now or will be in danger because of the acute long-term care bed shortage for the indigent", N.J.A.C. 8:30-14.1.

B. The Proceedings Below

Following agency adoption of the regulation, Appellants took a direct appeal to the Appellate Division of Superior Court, challenging the facial validity of the regulation. The Public Advocate of New Jersey sought to defend the regulation and was granted leave to intervene as a party. Appellants' motion for an interim stay of the regulations was denied (A. 22).[1] The Appellate Division ultimately upheld the regulation (A. 20 to 33). The State Supreme Court, following its grant of certification, unanimously upheld the regulation (A. 1 to 19).

The only record below consists of the material considered by the state agency. This material includes the written comments received by the agency when it proposed the regulation, oral comments received during the course of several meetings of the Health Care Administration Board, and various documents filed with the agency outlining the extent of the nursing bed shortage. The agency concluded, and the reviewing courts found on the basis of the agency record, that many nursing homes either refused to accept or unduly limited Medicaid eligible admissions (A. 3 to 11) and as a result "there is an acute shortage of nursing home beds available for indigent persons," (A. 9).

At the agency level, the nursing home industry contended, among other things, that the propsed regulation took their property without just compensation in violation of the Fifth Amendment to the Constitution of the United States. This argument was renewed by the Appellants herein to the reviewing state courts. Despite the "taking" claim, Appellants neither presented to the agency nor the courts any financial evidence indicating that the operation of the regulation would cause them substantial, irreparable, or, for that matter, any degree of economic injury. Rather, Appellants' sole assertion was that the regulation on its face constituted a taking of their property because their profits would obviously be reduced if they had to treat indigents, even with Medicaid reimbursement.

On this appeal from the decision of the State Supreme Court, Appellants invoke the Takings Clause of the Fifth Amendment.

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1. The designation "A." refers to the Appendix of the Appellants.

II.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The State Regulatory Scheme Does Not Result in a Taking of Appellants' Property

The Appellants argue that the regulatory scheme in question is constitutionally infirm because the State has restricted the highest use of their property to avoid what would otherwise be a direct obligation of the State, *i.e.*, providing nursing care service to the needy elderly. Essentially, then, what Appellants propose is that the economic injury to them — potential loss of profits — must be borne by the public, rather than remain with the individual property owner. But aside from a bald and legally unsupportable allegation that the State cannot restrict the most profitable use of their property, Appellants advance no other theory which would command the result they seek.[2]

There is no set formula for determing when a governmental regulation constitutes a taking of private property requiring compensation by the public. *Penn Central Transp. Co. v. City of New York*, 438 *U.S.* 104, 123 (1978). The particular circumstances of the case are paramount, and the resolution of the issue turns on ad hoc factual inquiries. *Ibid.* Essentially, the question is resolved by a weighing of private and public interests. The public interest is the extent to which the regulation benefits a public purpose, and

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2. In framing their argument, Appellants do not appear to proceed on the theory that they are entitled to be compensated because they have lost the right to exclude indigent persons at their facilities. Although an essential attribute of private property is the right to exclude others, *Kaiser Aetna v. U.S.*, ___ *U.S.* ___, 100 *S.Ct.* 383, 391-392 (1979), the loss of that right does not in itself entitle the owner to just compensation. *Pruneyard Shopping Center v. Robins*, ___ *U.S.* ___, 100 *S.Ct.* 2035, 2041-2042 (1980). The extent of the economic injury is the foremost concern, and it is that injury that must be balanced against the owners' loss of the right to exclude others. *Ibid.* Here the economic injury is inconsequential. See text at pp. 5-6, *infra*. In any event, under state law the Appellants as nursing home owners have no absolute right to exclude certain members of the public since they operate a quasi-public business which is vital to the health, welfare and safety of all state citizens (A. 10).

the private interest involved is the extent and nature of the economic injury. *Agins v. City of Tiburon*, ___ *U.S.* ___, 100 *S.Ct.* 2138, 2141 (1980); *Penn Central Transp. Co., supra*, 438 *U.S.* at 123-126.

In weighing the private and public interests in this case, it is abundantly clear that the regulation is not violative of the Takings Clause. Even Appellants do not deny the existence of a serious indigent nursing bed shortage. Moreover, the record below is uncontradicted to the effect that many State licensed nursing homes either refuse or severely limit indigent (*i.e.*, Medicaid eligible) admissions, and that as a result the health and welfare of the elderly in need of but unable to obtain nursing care is in jeopardy. Indeed, the State Supreme Court concluded as a factual matter that "the regulations in question are directed at an acute social problem affecting the health and welfare of the needy, aged and infirm," (A. 13). The regulation at issue is thus reasonably necessary to the effectuation of a substantial public purpose, and hence cannot be struck down on the grounds that it does not advance a legitimate state interest. The question then becomes whether the regulation is invalid because it exacts an unduly harsh economic impact upon Appellants' use of their property.

The alleged economic injury to Appellants is diminution of profits. But there is no proof in the record below that Appellants will suffer a loss in profits if they are required to accept Medicaid eligible patients. Moreover, the regulation is not rendered infirm by dint of the Takings Clause even if it can be reasonably assumed that there will be a reduction in Appellants' profits, since "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon*, 260 *U.S.* 393, 413 (1922). Thus, regulations which have limited the most profitable use of private property have consistently been upheld against constitutional "takings" attacks. See, *e.g. Andrus v. Allard*, ___ *U.S.* ___, *100 S.Ct.* 318 (1979) (upholding regulations which limited commerce in certain species of birds); *Goldblatt v. Hempstead*, 369 *U.S.* 590 (1962) (upholding an ordinance prohibiting excavation below the water level). The approach of the Court has been that a claim of potential loss of profits "provides a slender reed upon which to rest a takings claim," *Andrus v. Allard, supra*, 100 *S.Ct.* at 327, particularly where the regulation involved substantially advances an important public purpose.

Here, the potential loss of profits argument does not even provide a "slender reed" to support the constitutional claim in view of the explicit regulatory guarantee that profits cannot be reduced below a "just and reasonable" return. The economic injury to Appellants, then, is factually and legally insignificant. It certainly is not constitutionally cognizable, for it cannot be said that in the face of a regulation designed to alleviate an acute health crisis the Fifth Amendment will nonetheless be invoked to protect the right of a private property owner to retain a profit margin over and above that which is just and reasonable.

As was pointed out in *Andrus v. Allard, supra*, 100 *S.Ct.* at 327, the resolution of each takings case "calls as much for the exercise of judgment as for the application of logic." Appellants —who operate a quasi-public business — would have the public bear the entire expense of caring for the indigent infirm elderly while they are free to reap whatever profits the market will permit. The Fifth Amendment Takings Clause requires no such thing.

The Public Advocate therefore submits that the regulation under review does not take Appellants' property within the meaning of the Fifth Amendment injunction ". . . nor shall private property be taken for public use, without just compensation."

B. Even if there is a Taking, the State has Provided the Appellants with Just Compensation.

Assuming that the regulatory scheme does result in a taking of Appellants' property, there is nonetheless no substantial constitutional issue presented because the State has offered just compensation. By defining an "indigent" person as one who is eligible for Medicaid, the State has provided the Appellants with the means to receive governmental reimbursement for the care and treatment of those indigent patients Appellants are required to accept. Although Appellants attack this reimbursement method as being constitutionally deficient, they do not directly allege that the level of reimbursement is in itself inadequate.[3] Rather,

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3. An allegation such as that, as pointed out by the Supreme Court below, would have to come via an attack on the regulation as applied, not, as here, on a facial attack (A. 17).

Appellants claim that the constitutional infirmity in the compensation system lies in the fact that in order to receive just compensation they must join the Medicaid program. According to Appellants, they cannot be bound to join what is otherwise a voluntary program. Hence, since presumably Appellants do not wish to join this program, they conclude that they have not received just compensation. But, as the State Supreme Court observed, the regulation in question merely "encourages", but does not compel participation in Medicaid. (A. 17). Just compensation is readily available to Appellants. If they choose not to take it, they cannot be heard to complain.

Since the gist of Appellants' argument is the method, not amount, of compensation, then presumably Appellants would have no basis to complain if the State had decided to pay them compensation equivalent to that of the Medicaid rate without requiring Appellants to join the Medicaid program. It strains the ends of logic, however, to discern any constitutional difference between compensation which is identical in all respects except that, on the one hand, it is paid for wholly out of state funds, and, on the other hand, paid for through the Medicaid program, in which case the State would receive matching federal dollars.

The Public Advocate therefore submits that Appellants have been justly compensated.

CONCLUSION

For these reasons, this Court should dismiss this appeal. Alternatively, if this Court treats this appeal as a petition for certiorari, the petition should be denied.

Respectfully submitted,

CARL S. BISGAIER, Director
Division of Public Interest Advocacy
Department of the Public Advocate
COUNSEL FOR APPELLEE

ARTHUR PENN
Assistant Commissioner
Department of the Public Advocate

On The Brief

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Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

ADRIAN M. FOLEY, JR.,
Counsel for Appellants,
Gateway I,
Newark, New Jersey 07102.
(201) 643-2060

Of Counsel:

THOMAS S. COSMA,
CONNELL, FOLEY & GEISER,
Newark, New Jersey.

October 17, 1980

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Whether a New Jersey administrative regulation which mandates that private nursing homes accept and treat a "reasonable number" of "medically indigent" patients and prohibits transfers of patients when their private funds are exhausted, as a precondition to licensure, is a valid exercise of the police power or a "taking" of private property for a public use within the meaning of the Fifth Amendment?

2. If the New Jersey administrative regulation is a "taking" under the Fifth Amendment, can the State avoid the necessity of providing just compensation by (a) authorizing and encouraging the nursing homes to seek recompense from other private paying patients and (b) forcing the private nursing homes to participate in the voluntary State Medicaid program?

3. Do administrative regulations which impose upon a renewal licensee the obligation to make available a "reasonable number of beds" to a "reasonable number of indigents" and that the licensee "shall be entitled to a reasonable rate for Medicaid patients" suffer from unconstitutional vagueness and ambiguity by providing no effective limitations on the number of indigents and the method and amount of reimbursement so they cannot be understood by persons of common intelligence?

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No. 80-301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY, NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES,

Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Both the New Jersey Commissioner of Health and the Department of the Public Advocate have filed motions to dismiss in response to the Appellant's Jurisdictional Statement. This Answering Brief is devoted to the substantial federal question at the core of this case: May

the States compel private nursing homes to participate in the State Medicaid program in order to receive some compensation for a taking?

At least the Public Advocate's argument has the intellectual honesty to admit that the states have ascribed this power into themselves without any basis in federal law:

> Just compensation is readily available to Appellants. If they choose not to take it, they cannot be heard to complain.[1]

The Commissioner of Health, however, has sought to convince this Court that federal law supports New Jersey's confiscatory plan. Nothing could be further from the truth.

Appellees have distorted the meaning of 42 U.S.C. 1396 a (a)(23), the "free choice of provider provision" by artfully excerpting the statute. The Commissioner of Health quotes a portion of that provision, but deletes the phrase which clearly underscores the voluntary character of the Act. The Commissioner's brief states:

> Any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, . . . or person, qualified to perform the service or services required. . . .[2]

The very next phrase of §23, which was omitted, reads, who "undertakes to provide him such services." "To undertake" suggests an action done of one's own volition. If Congress contemplated compelled participation, this last

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[1] Brief for Appellee Department of Public Advocate, at p. 7.

[2] Brief for Appellee Commissioner of Health, at pp. 10-11.

phrase would not have been necessary. 42 C.F.R. §447.204 requires that payments by the states be high enough to "enlist" a sufficient number of providers. Again, "enlist" clearly implies voluntariness. If the regulation had any other meaning, there would be no reason for mandating that payments be made attractive.

Appellees' reliance on *Briarcliff Haven, Inc.* v. *Dept. of Human Resources,* 403 F. Supp. 1355 (N.D. Georgia 1975) is misplaced. *Briarcliff* holds that the "free choice of provider" requirement (42 U.S.C. §1396a(a)(23)) is designed "to assure each medicaid recipient a free choice among qualified providers." (403 F.Supp. at 1362). Appellees use this language to suggest that a medicaid recipient should be able to compel any nursing home to take him in, as long as it is qualified (i.e. meets certain medical standards). Yet, the language on which Appellees rely presupposes that the "qualified" homes from which a medicaid recipient may choose are voluntary participants. Briarcliff Haven Nursing Home voluntarily joined the State Medicaid program. Nowhere in the case is there a suggestion that the state can compel participation. In fact, the court notes that the "provider agreement is best viewed as a business contract between the state and each provider by which their participation in the Georgia Medicaid Program is defined." (403 F.Supp. at 1358). This contractual arrangement reflects the voluntary nature of Medicaid.

Appellees cite *Rush* v. *Parham,* 440 F. Supp. 383 (N.D. Ga. 1977), app. pending *sub nom Rush* v. *Poythress,* No. 77-2743 (5th Cir.) to support the proposition that a state can require a hospital or nursing home to accept Medicaid patients. In *Rush,* the hospital, a voluntary Medicaid participant, refused transsexual surgery for a Medicaid recipient whose physician deemed the surgery phy-

chologically necessary. The issue was not compelled participation, but compelled procedures imposed on voluntary participants. In fact, the Court noted that the "programs of Medicaid and Medicare were shaped from a decision in favor of private enterprise and against state or socialized medicine as it is practiced in other countries." (440 F.Supp. at 389).

In *Beal* v. *Doe,* 432 U.S. 438 (1977), this Court held that a state participating in the Medicaid Program is not required to fund the cost of non-therapeutic abortions. The Court noted that a participating state is afforded great latitude in molding its medical assistance program. Appellees use this language to support their proposition, when in fact it was intended to support the proposition (as in *Rush, supra*) that states can compel procedures, not participation.

Beal is based on 42 *U.S.C.* 1396a-(a)(17), which requires each state to establish "reasonable standards . . . for determining . . . the *extent* of medical assistance under the plan which are consistent with the objectives of [Title XIX]." (Emphasis added.) Does "extent" refer to the breadth of services which a participating hospital must provide or to the lengths to which a state may go in foisting its own economic burden on private institutions? Clearly the case law supports only the former proposition.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drugstores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring). Here, the statute (Title XIX) clearly deals in terms of the types of services which participants must provide. See *Beal, supra,* 432 U.S. at 444 ("The statute [Title XIX] is cast in terms that require participating states to provide financial assistance with respect to five broad categories of medical treatment.")

Finally, Appellee cites *New York Dept. of Social Services* v. *Dublino,* 413 U.S. 405 (1973) to support the claim that "any intention by Congress to supercede the exercise of state power must be expressly stated".[3] The issue in *Dublino* was whether the Social Security Act bars a state from independently requiring individuals to accept employment in order to receive federally-funded aid to families with dependent children. *Dublino* presents the following scenario: in 1967, when the federal work program was passed, 21 states already had their own welfare work requirements as a condition of AFDC eligibility, so, as the Court noted, if Congress had intended to pre-empt state plans, such intention probably would have been expressed in unambiguous terms. In the instant case, on the other hand, Appellees cannot point to a single state which required nursing homes to accept indigents prior to the passage of the federal act.

Furthermore, the *Dublino* Court found that the federal program was limited in scope, that it was a "partial program", not meant to be "all embracing", leading it to conclude that Congress must have intended that states set up their own programs. (413 U.S. at 418 and 419). In fact, to conclude to the contrary would be to interpret a federal statute to "negate its own purpose." (413 U.S. at 420). *Cf. Townsend* v. *Swank,* 402 U.S. 282, (State AFDC eligibility standards which exclude persons eligible under the federal standards violate the Supremacy Clause.)

Dublino also requires that the construction of the statute advanced by the federal agency charged with its execution should be followed unless there are compelling reasons that it is wrong. But HEW was unaware of the Health Care Administration Board's interpretation of the

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[3] Brief for Appellee Commissioner of Health, at p. 12.

statute, since it originated from the State Department of Health, and not from State Medicaid Agency (Department of Human Resources). Appellees argue that in the absence of any affirmative persuasive showing that the federal agency's interpretation is incorrect, that interpretation must stand. Appellees ignore the clear decisional law to the contrary. *See, National Union of Hospital & Health Care Employees* v. *Carey,* 557 F.2d 278, 282 (2d Cir. 1976) (Appellants "have the choice of either making their operation more efficient or not accepting Medicaid patients"); *Minnesota Assn. of Health Care Facilities* v. *Minnesota Dept. of Public Welfare,* 602 F.2d 150, 154 (8th Cir. 1979) ("Participation by a nursing home as a provider of health care services to Medicaid recipients is voluntary.")

CONCLUSION

For these reasons in addition to those set forth in the Jurisdictional Statement, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ADRIAN M. FOLEY, JR.,
Counsel for Appellants.

Dated: October 17, 1980